



San Francisco Law Library

436 CITY HALL

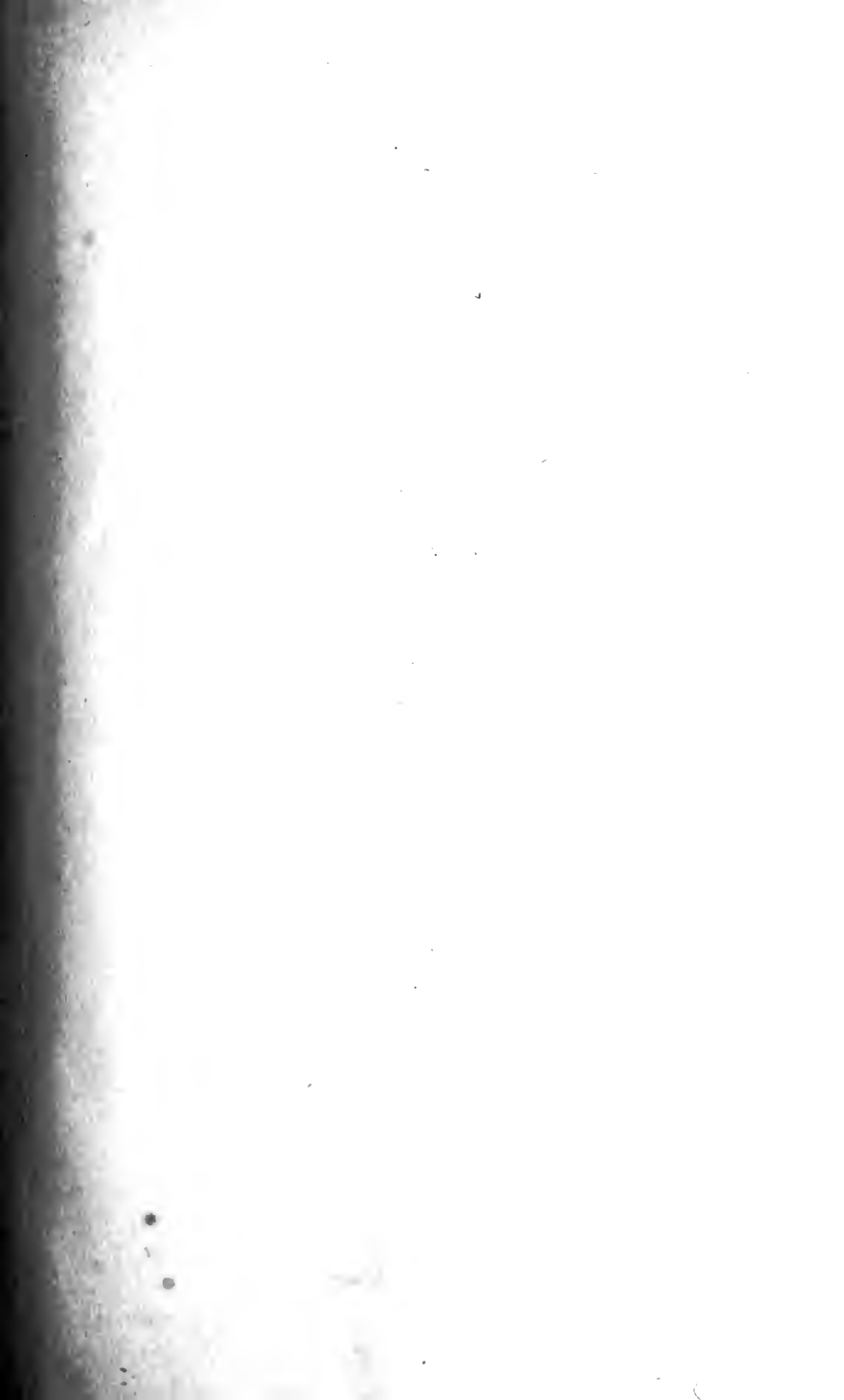
No. 144091

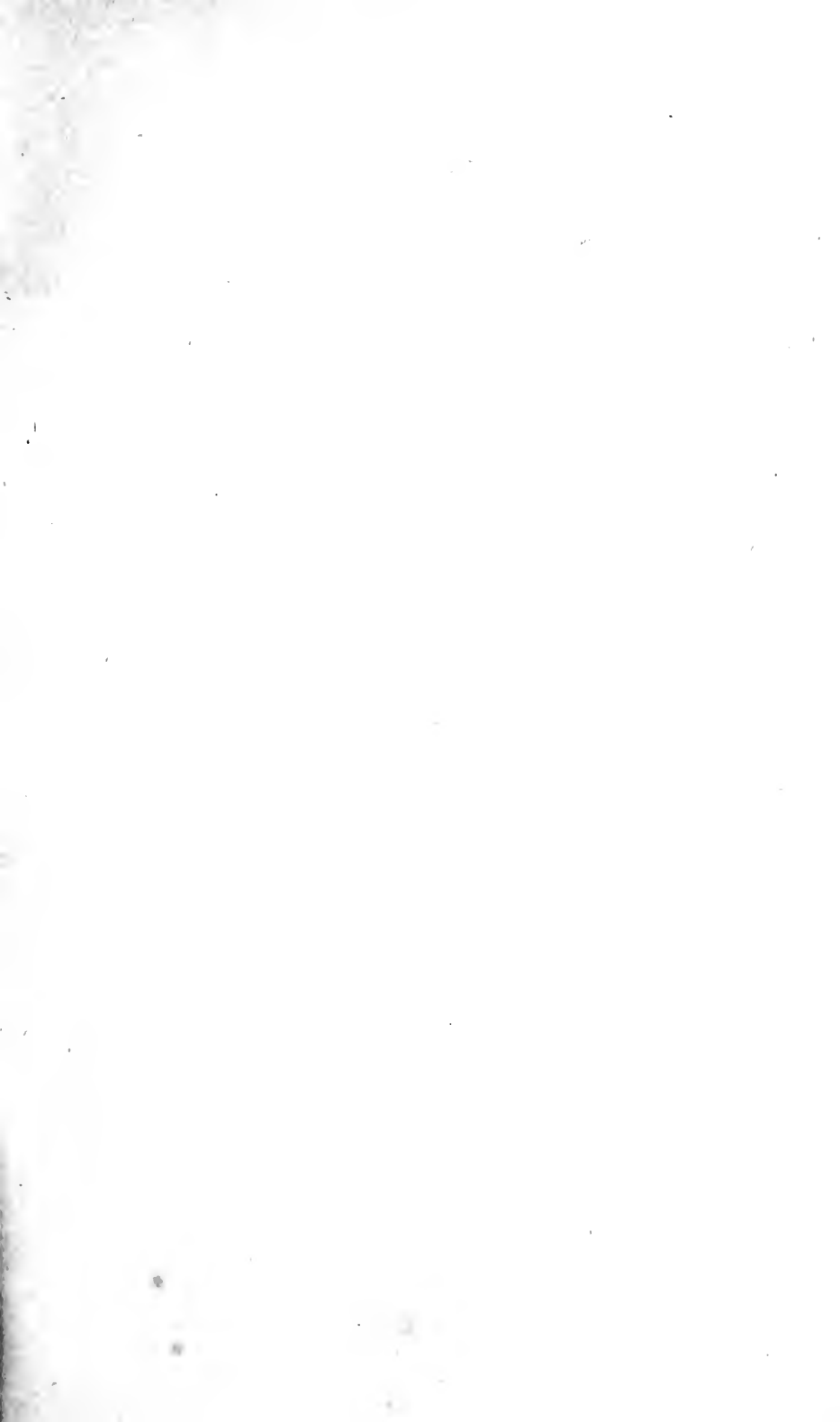
EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.







0 No. 12348

0
y6
United States
Court of Appeals
For the Ninth Circuit.

TOWN OF FAIRBANKS, ALASKA, a Municipal
Corporation,

Appellant.

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,

Appellees.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska,
Fourth Division.

FILED

DEC 29 1949

PAUL P. O'BRIEN,

No. 12348

**United States
Court of Appeals**

For the Ninth Circuit.

**TOWN OF FAIRBANKS, ALASKA, a Municipal
Corporation,**

Appellant.

vs.

**UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,**

Appellees.

Transcript of Record

**Appeal from the District Court
for the Territory of Alaska,
Fourth Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Publication.....	42
Answer to Petition and Order to Show Cause.24,	30
Appellant's Statement of Points to Be Relied on and Designation of Parts of Record to Be Printed	135
Assignments of Error.....	48
Attorneys of Record.....	1
Certificate of Clerk of the D. C. Court to Tran- script of Record.....	134
Citation of Appeal.....	55
Cost Bond on Appeal.....	56
Judgment	43
Marshal's Return of Service of Notice of Hear- ing	41
Notice of Appeal.....	45
Notice of Hearing.....	38
Order Allowing Appeal and Fixing Amount of Cost Bond	54
Order Fixing Hearing.....	21
Petition	2

INDEX	PAGE
Petition for Allowance of Appeal.....	47
Praeceptum for Transcript of Record.....	61
Reply to Answer of Protestant Charles Slater..	36
Reply to Answer of Protestant U. S. Smelting Refining and Mining Co.....	33
Resolution	20
Stipulation Fixing Transcript of Trial as Bill of Exceptions.....	61
Stipulation Re Printing of Record.....	46
Stipulation Re Settling Bill of Expectations and Docketing Appeal.....	59
Transcript of Trial.....	63
Witnesses, Petitioner's:	
Call, Irving H.	
—direct	100
—cross	120
Erickson, Clara M.	
—direct	78, 122
—cross	84, 123
—redirect	87, 125
—recross	95
Griffin, Reuel	
—direct	126
Potter, John Frank	
—direct	64
—cross	74

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 6032

In the Matter of the Annexation of Certain Lands
known as Slaterville, Garden Island and North
Fairbanks,

To: The Town of Fairbanks, Alaska, a municipal
corporation.

ATTORNEYS OF RECORD

COLLINS & CLASBY,
Fairbanks, Alaska,

Attorneys for Petitioner & Appellant.

JULIEN A. HURLEY,
Fairbanks, Alaska,

SOUTHALL R. PFUND,
San Francisco, California,

Attorneys for Protestants & Appellees.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 6032

In the Matter of

The Annexation of Certain Lands known as "Slaterville," "Garden Island" and "North Fairbanks,"

To: The Town of Fairbanks, Alaska, a Municipal Corporation.

PETITION

Comes Now the Town of Fairbanks, Alaska, a Municipal Corporation and presents this, its petition for the Annexation to the Town of Fairbanks, Alaska, of the area known as "Slaterville," "Garden Island" and "North Fairbanks," as is hereinafter more particularly described, and as a basis therefor alleges as follows:

I.

That the Town of Fairbanks, Alaska, is a municipal corporation organized and existing under and by virtue of the laws of the Territory of Alaska. That the boundaries of the Town of Fairbanks, Alaska, are set forth in the Order incorporating said Town in Cause Number 118 before the above entitled Court, filed December 9, 1903. That after incorporation there was set aside from public lands the area incorporated which was more exactly surveyed and established in 1907 by the U. S. Cadastral

engineers as U.S. Survey No. 438. That the incorporated city limits of the Town of Fairbanks, Alaska, on the north boundary thereof, was amended to include certain lands as is more particularly described in Cause No. 2539, in the District Court for the Territory of Alaska, entitled in the Matter of the Annexation of the North Addition of the Town of Fairbanks.

II.

That the following is a description by metes and bounds of the Territory sought to be annexed by this proceeding:

Beginning at a meander corner No. 1 of the plat of a survey for the proposed addition to the Town-site of Fairbanks, Alaska, dated July, 1947, said point being meander corner No. 7 of U.S. Survey No. 806, as amended April 16, 1920, and situate on the south meander line of Noyes Slough; thence meandering said Noyes Slough upstream, S. $70^{\circ}17'$ E. 418.9 ft. to meander corner No. 2; S. $78^{\circ}39'$ E. 300.0 ft. to meander corner No. 3; S. $48^{\circ}51'$ E. 258.0 ft. to meander corner No. 4; S. $26^{\circ}18'$ E. 286.0 ft. to meander corner No. 5; S. $40^{\circ}59'$ E. 152.37 ft. to meander corner No. 6; S. $30^{\circ}43'$ E. 165.0 ft. to meander corner No. 7; S. $12^{\circ}51'$ W. 50.0 ft. to meander corner No. 8; S. $34^{\circ}49'$ W. 98.5 ft. to meander corner No. 9; S. $60^{\circ}45'$ W. 84.0 ft. to meander corner No. 10; S. $74^{\circ}40'$ W. 188.0 ft. to meander corner No. 11; N. $47^{\circ}28'$ W. 32.2 ft. to meander corner No. 12; N. $83^{\circ}58'$ W. 147.4 ft. to

meander corner No. 13; N. $88^{\circ}58'$ W. 100.0 ft. to meander corner No. 14; S. $59^{\circ}56'$ W. 220.2 ft. to meander corner No. 15; S. $52^{\circ}40'$ W. 304.87 ft. to meander corner No. 16; S. $30^{\circ}51'$ W. 228.1 ft. to meander corner No. 17 at which point the meander line of Noyes Slough joins the north meander line of the Chena River; thence meandering said Chena River downstream, S. $79^{\circ}50'$ W. 305.18 ft. to meander corner No. 18; S. $68^{\circ}51'$ W. 156.65 ft. to meander corner No. 19; S. $47^{\circ}34'$ W. 233.94 ft. to meander corner No. 20; S. $40^{\circ}45'$ W. 258.25 ft. to meander corner No. 21 situate at the junction of the meander lines of the Chena River and Garden Island Slough, said meander corner No. 21 being the N.E. corner of the present Fairbanks Townsite boundary; thence meandering said Garden Island Slough downstream along the said Fairbanks Townsite boundary, N. $47^{\circ}53'$ W. 178.96 ft. to meander corner No. 22; N. $64^{\circ}19'$ W. 35.73 ft. to meander corner No. 23; N. $50^{\circ}07'$ W. 214.14 ft. to meander corner No. 24; N. $55^{\circ}35'$ W. 221.8 ft. to meander corner No. 25; N. $64^{\circ}53'$ W. 187.96 ft. to meander corner No. 26; N. $74^{\circ}24'$ W. 188.71 ft. to meander corner No. 27; S. $83^{\circ}55'$ W. 249.75 ft. to meander corner No. 28, said corner No. 28 being corner No. 5 of U.S. Survey No. 847; thence S. $47^{\circ}21'$ E. 101.64 ft. to meander corner No. 29; thence S. $10^{\circ}44'$ E. 496.32 ft. to meander corner No. 30; thence S. $10^{\circ}30'$ E. 60.06 ft. to meander corner No. 31; thence S. $17^{\circ}06'$ W. 495.0 ft. to meander corner No. 32;

said meander corner No. 32 being corner No. 4 of U.S. Survey No. 847; thence N. $49^{\circ}45'$ W. 613.8 ft. to meander corner No. 33; thence N. $49^{\circ}47'$ W. 140.02 ft. to meander corner No. 34; thence N. $32^{\circ}23'$ W. 575.12 ft. to meander corner No. 35; thence N. $48^{\circ}02'$ E. 596.35 ft. to meander corner No. 36; thence N. $25^{\circ}14'$ E. 2,368.02 ft. to meander corner No. 37; thence N. $76^{\circ}04'$ E. 524.6 ft. to meander corner No. 38; thence S. $24^{\circ}51'$ E. 533.2 ft. to meander corner No. 39; thence S. $39^{\circ}00'$ E. 198.0 ft. to meander corner No. 40; thence S. $44^{\circ}30'$ E. 554.4 ft. to meander corner No. 1 and the point of beginning, which said territory has been platted, a copy of which plat is hereto attached marked "Exhibit A." That said plat sets forth the limits and boundaries of the Territory sought to be annexed by metes and bounds and is based on actual surveys made by J. Frank Potter, an Engineer.

III.

That there are 277 inhabitants of the area above described and sought by this petition to be annexed to the Town of Fairbanks, Alaska.

IV.

There are 282 owners of substantial property interests in land or possession in land or improvements upon land in the Territory above described and sought by this petition to be annexed to the Town of Fairbanks, Alaska.

V.

That the Territory sought to be annexed as above described is contiguous to the Territory of the Town of Fairbanks, Alaska, a municipal corporation.

VI.

That the persons signing this petition constitute a majority to wit: 53 per cent of the owners of substantial property interests in land or possessory right in land or improvements upon land within the limits of the territory above described and by this petition sought to be annexed by the Town of Fairbanks, Alaska.

VII.

That the territory above described and sought to be annexed is a substantial residential area that is well developed and fast becoming fully settled. That the area is largely blocked off into streets of a nature conforming with the Town of Fairbanks and the expansion thereof. That there does not exist in said area any private right that will be injured by annexation; and that it is just and reasonable that the above described territory be annexed by the Town of Fairbanks, Alaska.

Wherefore petitioners pray that the Court:

1. Set a time and place for the hearing on this petition, providing for notice thereof as is required by law; and specify such facts in addition to these alleged herein of which the Court will require proof;

2. Enter herein, upon hearing, an order requiring an election in the manner provided by law; and

3. Upon certification following election judge and declare the territory, in this petition described, annexed to the Town of Fairbanks, Alaska.

/s/ RAY KOHLER,

Mayor, Town of Fairbanks.

/s/ JACK BOULET,

Owner of Property.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Town of
Fairbanks.

United States of America,
Territory of Alaska—ss.

Ray Kohler and Jack Boulet, being first duly sworn, each for himself and not one for the other, on oath deposes and says:

Ray Kohler: That I am the Mayor of the Town of Fairbanks, Alaska, a municipal corporation, and subscribe to this verification on behalf of said Town under authority so to do given by the Council of the Town of Fairbanks, Alaska;

Jack Boulet: That I am the owner of a substantial property interest in land within the territory to be annexed as described in the foregoing petition, and a resident and inhabitant of said territory.

That petitioners have read the within and fore-

going petition and the signatures attached thereto, know the contents thereof and believe the same to be true.

RAY KOHLER.

JACK BOULET.

Subscribed and sworn to before me this 9th day of November, 1948.

[Seal] /s/ CHAS. J. CLASBY,

Notary Public in and for the Territory of Alaska.

My commission expires:

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
1. Joe Gunning	Owner	Fairbanks	Portion Block 12 Slater	
	Purchase	In escrow		
2. Thos. D. Heath	Contract	1st National Bank	Portion Block 12 Slater	Dec 12, 1947
3. Ruthellen A. Heath	Co-owner	1st National Bank	Portion Block 12 Slater	Dec 12, 1947
4. David H. Harper	Owner	Veteran loan	Lot 11 Block 8 Slater	1947
5. Iris Fredrickson	Owner	Recorder's office	Lot 12 Block 8	April, 1947
6. Ivan Fredrickson	Co-owner	Recorder's office	Lot 12 Block 8	April, 1947
7. Richard D. Meckel	Owner	Recorder's office	Lot 15 Block 8	1946
8. Alfred E. Lundstrom	Owner	Recorder's office	Lot 6 Block 9	Jan 7, 1948
9. Kathryn Lundstrom	Co-owner	Recorder's office	Lot 6 Block 9	Jan 7, 1948
	Contract			
10. Merry McAllister	Purchase	Escrow, K. Murray	Lot 12 Block 6	May 1946
11. H. O. Vick	Owner	Recorder's office	Block 11 Lots 1 & 2	Nov. 1947
	Purchase	In escrow		
12. Louis E. Johnson	Contract	1st National Bank	Block 3, Lots 11 & 12	
13. Nadine M. Johnson	Co-owner	1st National Bank	Block 3, Lots 11 & 12	
14. Ed Aldrich	Owner	Recorder's records	Block 3 Lot 9	1942
15. A. R. Lowman	Owner	Ken Murray	Block 3 Lot 8	
16. Mrs. A. R. Lowman	Co-owner	Ken Murray	Block 3 Lot 8	

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
17. John B. Bell.....	Owner	Record office	Block 3 Lot 7	1944
18. David Johnson	Owner	Recorder's office	Block 3 Lots 5 & 6	Aug 14, 1945
19. Sigrid Johnson	Co-owner	Recorder's office	Block 3 Lots 5 & 6	Aug 14, 1945
20. Pat H. Willoughby.....	Owner	Bank of Fairbanks	Block 5 Lot 7	1947
21. Gladys Willoughby	Co-owner	Bank of Fairbanks	Block 5 Lot 7 Slater	1947
22. Evans E. Howk.....	Owner	Record office	Block 5 Lot 8	Mar 20, 1947
23. Margaret G. Howk.....	Co-owner	Record office	Block 5 Lot 8	Mar 20, 1947
24. Thomas M. Roberts.....	Owner	Recorder's office	Block 8 Lot 6	Dec. 1945
25. Samuel C. Wilhaite.....	Contract of Sale	Office K. A. Murray	Lot 10 & 11 Block 9	May 1947
26. Mattie Belle Wilhaite.....	Contract of Sale	Office K. A. Murray Slater		May 1947
27. David V. McKeag.....	Contract of Sale	Recorder's Office	Lot 4 & 5 Block 9	June 1946
28. Mrs. David McKeag.....	Contract of Sale	Recorder's Office	Lot 4 & 5 Block 9	June 1946
29. Francis G. Brown.....	Owner	Recorder's Office	Lot 13 Block 9	Dec. 1947
30. Vera N. Brown.....	Owner	Recorder's Office	Lot 13 Block 9	Dec. 1947
31. James A. Williams.....	Co-owner	Recorder's Office	Lots 1 & 2 Block 9	May 1947

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
32. Barbara Williams	Co-owner	Recorder's Office	Lots 1 & 2 Block 9	May 1947
33. Arthur D. Johnson.....	Co-owner	1st National Bank	Lot 1 Block 10	June 1947
34. Mrs. Grace A. Johnson.....	Co-owner	1st National Bank	Lot 1 Block 10	June 1947
35. Gay A. Collins.....	Co-owner	1st National Bank	Lot 11 Block 14	Aug 25, 1947
36. Hilton L. Collins.....	Co-owner	1st National Bank	Lot 11 Block 14	Aug 25, 1947
37. Charlie S. Lee	Owner	Recorder's office	Lot 10 Block 14	July 22, 1946
38. Ray Newman	Co-owner	Recorder's office	Lot 2 & 4 Block 10	July 17, 1945
39. Mrs. Ray Newman.....	Co-owner	Recorder's office	Lot 2 & 4 Block 10	July 17, 1945
40. Jonathan Vandeneer	Owner	Recorder's office	Lot 9 Block 14	Nov. 1947
41. Herbert Brewster	Co-owner	Recorder's office	Lot 6 Block 14	June 1946
42. Marion Brewster	Co-owner	Recorder's office	Lot 6 Block 14	June 1946
43. W. D. Conant.....	Owner	Recorder's office	Lot 3 Block 14	June 21, 1946
44. James J. Cleasby.....	Owner	Recorder's office	Lot 7 Block 14	June 1946
45. Donald MacDonald	Owner	Recorder's office	West 1/2 Lot 6 Block 10	Jan. 1947
46. Roger R. Rhodes	Owner	Recorder's office	Lot 8 Block 14	Oct. 1946
47. Emma Rhodes	Owner	Recorder's office	Lot 8 Block 14	Oct. 1946
48. William N. Lockwood.....	Owner	Recorder's office	Lot 16 Block 9	March 1947
49. Laura E. Lockwood.....	Owner	Recorder's office	Lot 16 Block 9	

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
50. J. W. Eastland.....	Owner	1st National Bank	Lot 15 Block 9	Nov. 1947
51. Naomi Eastland	Co-owner	Recorder's office	Lot 15 Block 9	Nov. 1946
52. C. F. Heflinger.....	Owner	Recorder's office	Lot 1-3-5-8	Aug. 1945
53. Robert A. Saunders.....	Owner	Recorder's office	Lot 5 Block 7	Oct. 1947
54. Rudolph Johnson	Owner	Recorder's office	Lot 4 Block 7	Sept. 1944
55. Anita Ruth Kirkland.....	Co-owner	Recorder's office	Lot 10 Block 4	May 1947
56. August A. Johnson.....	Co-owner	Recorder's office	Lot 10 Block 4	May 1947
57. E. W. Crafton.....	Owner	Recorder's office	Lot 20 Block 3	April 1946
58. Mrs. E. W. Crafton.....	Co-owner	Recorder's office	Lot 20 Block 3	April 1946
59. George Gilbertson.....	Owner	Recorder's office	Lot 3 & 4 Block 4	Nov April 1945
60. Earl E. Cook	Co-owner	Fairbanks	Lot 7 & 8 & W $\frac{1}{2}$ 9 Blk 2	Oct. 1939
61. Emma M. Cook	Co-owner	Fairbanks	Lot 7 & 8 & W $\frac{1}{2}$ 9 Blk 2	Oct. 1939
62. E. I. Baggen.....	Co-owner	Fairbanks	Lot 9 & 10 & E $\frac{1}{2}$ 9 Blk 2	June 1942
63. Mertie L. Baggen	Co-owner	Fairbanks	Lot 9 & 10 & E $\frac{1}{2}$ 9 Blk 2	June 1942
64. F. H. Mapleton.....	Co-owner	Fairbanks	Lot 3 in Block 8	Trustee Deed 1935 or 1936
65. John Yurkovich	Co-owner	Fairbanks	Lots 5 & 6 Block 2	1941

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Chil-dren	Where Recorded or Found	Description (full)	Date Acquired (comments)
66. Molly Yurkovich.....	Co-owner		Fairbanks	Lots 5 & 6 Block 2	1941
67. Ralph B. Norris.....	Co-owner		Fairbanks	Lot 1 in Block 8	Tr. Deed 1936
68. Alma Lee Norris.....	Co-owner		Fairbanks	Lot 1 in Block 8	Tr. Deed 1936
69. Patricia James	Co-owner		Fairbanks	Lot 4 Block 8	April 1947
70. Floyd or Mike James	Co-owner		Fairbanks	Lot 4 Block 8	April 19, 1947
71. Alvin O. Bramstedt	Co-owner		Fairbanks	Lot 1 Block 9	Sept. 1945
72. Rosa L. Bramstedt	Co-owner		Fairbanks	Lot 1 Block 9	Sept. 1945
73. James Cassidy } 74. Magdalene Cassidy }	Deed	2	Vol. 28 P. 410	Lot 3 Block 1 Slater Homestead	Sept 15, 1938 x MC
James Cassidy } Magdalene Cassidy }	Deed		Vol. 34 P. 500	Lot 15 Block 1 Slater Homestead	MC Mar 13, 1945 x
75. Harry B. Palmer } 76. Ruth A. Palmer }	Deed	1	Vol. 34 P. 353	Slater Homestead Lot 6 Block 1	MC Mar 18, 1946 x
77. Lisetta Manske	Deed			Lot 1A 1B Block 1 Slater	Aug 31, '43 MC
78.	Non-owner			Lot 1A 1B Block 1 Slater	Aug. 31, '43 MC
79. Ted C. Mathews } 80. Alberta Mathews }	Deed } Deed }	2	#103542 Vol. 35 P. 59	Lot 5 Block 5 (part) Lot 1 Block 1 Slater	May 29, '47 MC Apr 17, 1944 x
81. Virginia B. Parrish.....	Deed	1	Vol. 35 P. 435	Lot 19 19A Block 1 Slater	Sept 17, 1947 x MC

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Chil- dren	Where Recorded or Found	Description (full)	Date Acquired (comments)	Ck'd
82. Nell H. Smith	Deed	1		Lot 16 Block 1 Slater West $\frac{1}{3}$ Lot 17 Block 1	MC	x
83. V. Maurice Smith	Deed				MC	x
84. Mary Murray	Deed	2	Fairbanks Precinct	E 47' Lot 17 & Lot 18 Block 1 Slater Lot 3 Block 8 Brandt	Dec. 1947 Mar. 1945	MC
85. Ray H. Pratt	Deed			Lot 14 Block 1 Slater	Apr. 1947	MC
86. Myrtle I. Pratt	Deed			Lot 14 Block 1 Slater	Apr. 1947	MC
87. Robert A. MacDonald	Deed	2	Fairbanks	Lot 4 Block 1 Slater		MC
88. Norma H. MacDonald	Deed		Fairbanks	Lot 4 Block 1 Slater		MC
89. Alta B. Billing	C/S		Fairbanks	Lot 8 Block 1 Slater		MC
90. Bernice McLean	Deed		Fairbanks	Lot 5 Block 1 Slater	Sept. 1947	MC
91. Patrick Murphy	Owner		Fairbanks	Lot 9 Block 5 & Lot 22 Blk 1 Slater Sub	May 1947	
92. Chas. J. Clasby	Owner		Fairbanks Precinct	Lots 2 & 3 Block 6 Brandt Homestead	April 1947	
93. Hazel Clasby	Co-owner		Fairbanks Precinct	Lots 2 & 3 Block 6 Brandt Homestead	April 1947	

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
94. Juanita Boulet	Co-owner	Fairbanks Precinct	Lots 1 & 5 Block 6 Brandt Homestead	Nov 1, 1947
95. J. A. Boulet.....	Co-owner	Fairbanks Precinct	Lots 1 & 5 Block 6 Brandt Homestead	Nov 1, 1947
96. Maurice Butler	Owner	Fairbanks Precinct	Lot 5 Block 4 Brandt Homestead	Aug. 1942
97. Violet Butler	Co-owner	Fairbanks Precinct	Lot 5 Block 4 Brandt Homestead	Aug. 1942
98. Frances Taylor	Co-owner	Fairbanks Precinct	Lot 8 Block 2 Brandt	May 1944
99. Eva M. Hansen.....	Owner	Fairbanks Precinct	Lot 14 Blk 2 Slater Sub	
100. Arthur H. Hayr	Co-owner	Fairbanks Precinct	Lots 15A & 15B Blk 6 N. Fairbanks Addn.	Feb. 1946
101. Noreen L. Hayr.....	Co-owner	Fairbanks Precinct	Lots 15A & 15B Blk 6 N. Fairbanks Addn.	Feb. 1946
102. W. L. Lhamon.....	Owner	Fairbanks Precinct	Lot 19 & 20 Block 6 N. Fairbanks Addn.	Nov. 1940
103. Mrs. W. L. Lhamon.....	Co-owner	Fairbanks Precinct	Lot 19 & 20 Block 6 N. Fairbanks Addn.	Nov. 1940
104. Richard R. Jones.....	Contract Sale	Bank of Fairbanks	Part 12 Block 6 N. Fairbanks Addn.	April 1947
105. Alden L. Wilbur.....	Contract Sale	Fairbanks Precinct	Part 12 Block 6 N. Fairbanks Addn.	Oct. 1947

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
106. Mariel Wilbur	Contract Sale	Fairbanks Precinct	Part 12 Block 6 N. Fairbanks Addn.	Oct. 1947
107. Herschel J. Harter	Contract Sale	C. H. Clegg's office	Lot 1 Block 5 Brandt Homestead	Sept. 1945
108. Mrs. Pat Harter	Contract Sale	C. H. Clegg's office	Lot 1 Block 5 Brandt Homestead	Sept. 1945
109. Irving W. Abbott	Co-owner	Fairbanks Precinct	Lot 7 Blk 3 Brandt Ave.	Aug 7, 1947
110. Blanche N. Abbott	Co-owner	Fairbanks Precinct	Lot 7 Blk 3 Brandt Ave.	Aug 7, 1947
111. Jack Taylor	Owner	Fairbanks	Lot 8 Block 2 Brandt	May 12, 1944
112. Frankie A. Coe	Owner	Fairbanks	Lot 10 Block 2 Brandt	April 1943
113. William T. C. Coe	Co-owner	Fairbanks	Lot 10 Block 2 Brandt	April 1943
114. Royal C. Watkins	Owner	Fairbanks	Lot 9 Block 2 Brandt	Oct. 1945
115. Viola D. Watkins	Co-owner	Fairbanks	Lot 9 Block 2 Brandt	Oct. 1945
116. Howard Thorgaard	Owner	Fairbanks	Lot 7 Block 2 Brandt Homestead	April 15, 1941
117. Rachel A. Josephs	Owner	Fairbanks	Lot 5 Block 2 Brandt Homestead	Sept. 1936
118. P. V. Josephs	Owner	Fairbanks	Lot 5 Block 2 Brandt Homestead	Sept. 1936

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
119. Leif R. Ostnes.....	Owner	Fairbanks	N. Portion Lot 1 Blk 3 Brandt Homestead	May 1946
(Meredith G. Ostnes) 120. Mrs. Leif R. Ostnes.....	Owner	Fairbanks	N. Portion Lot 1 Blk 3 Brandt Homestead	May 1946
121. Harry A. Grissom	Owner	Fairbanks	S. Portion Lot 1 Blk 3 Brandt Homestead	1939
122. Nettie Grissom.....	Owner	Fairbanks	S. Portion Lot 1 Blk 3 Brandt Homestead	1939
123. Harold W. Richardson.....	Contract Sale	Territorial Vets Office	Lot 1, Block 8 Brandt Homestead	Oct. 1947
124. Alma M. Richardson.....	Contract Sale	Territorial Vets Office	Lot 1, Block 8 Brandt Homestead	Oct. 1947
125. James F. Borders	Co-owner	Fairbanks	Portion Lot 12 Block 6 N. Fairbanks Addn.	Nov. 1945
126. Irene M. Borders.....	Co-owner	Fairbanks	Portion Lot 12 Block 6 N. Fairbanks Addn.	Nov. 1945
127. Roy A. A. Larson.....	Deed	Fairbanks	Portion Lot 2 Block 7 N. Fairbanks Addn.	Mar. 1941
128. Wilbur Walker	Deed Co-owner	Fairbanks	Lot 19 20 15 & 16 Block 2 Slater Sub	April 1945

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
129. Thelma V. Walker.....	Co-owner	Fairbanks	Lot 19 20 15 & 16 Block 2 Slater Sub	April 1945
130. Bert E. Olsen.....	Owner	Fairbanks	Lot 6 Block 4 Brandt Homestead	Aug. 1942
131. Anne Branholm	Owner	Fairbanks		June 1, 1940 Jan. 1
132. Mary Hansen	Contract of Sale	1st National Bank	Lot 5 Block 6 Slater	Sept. 1946
133. Rudy Grassman	Contract of Sale	Collins & Clasby	Lot 4 Block 3 Brandt	Sept 30, 1947
134. Catherine Grassman.....	Contract of Sale	Collins & Clasby	Lot 4 Block 3 Brandt	Sept 30, 1947
135. G. A. Johnson	Owner	Fairbanks	East 1/2 Lot 21 Block 2 Slater	Aug. 1945
136. James T. Hutchison, Jr.....	Owner	Fairbanks	Lot 3 Block 3 Brandt	Oct. 1947
137. Lucille G. Hutchison.....	Co-owner	Fairbanks	Lot 3 Block 3 Brandt	Oct. 1947
138. W. G. Mitchell.....	Deed Co-owner	Fairbanks	Lot 2 Block 8 Brandt Homestead	Jan. 1947
139. Eve Mitchell	Co-owner	Fairbanks	Lot 2 Block 8 Brandt Homestead	Jan. 1947

Witnesseth: That we have read and understand the foregoing petition, hereby consent to the annexation therein requested and are persons qualified to so petition:

Signature	Property Interest	Where Recorded or Found	Description (full)	Date Acquired (comments) Ck'd
140. Edward M. Cox.....	Owner	Fairbanks	Lots 9 & 10 Blk 8 Slater	June 1946
141. Jean Cox	Owner	Fairbanks	Lots 9 & 10 Blk 8 Slater	June 1946
142. Jessie C. Anderson	Owner	Fairbanks	Lots 4 5 6 & 1/2 of 7 Blk 1	Lots 4 & 5 June 1936 Lots 6 & 1/2 of 7, 1930
Lee S. Sinek.....	Owner 1/2	Fairbanks	Lot 16 Blk 3 Lot 1 Blk 4	1940 - 1944
George P. Nehrbaas	Owner	Fairbanks	Block A and C	1942
Ray Johnson	Owner	North Addition	S. Portion Lot 2 Blk 7	1945
J. A. Korba.....	Owner	Brandt Sub. Div.	Lot 3 & 4 Block 2	1935
Max Baumeister	Owner	Brandt Sub. Div.	Lot 1 & 2 Block 4	Lot 1 - 1941 Lot 2 - 1938
Annette Anderson	Owner	Slaterville	Lot 8 Block 1	July 1944
Martin H. Ott	Owner	Brandt Sub. Div.	Lot 5 Block 3	Sept. 1946
Max O Miller.....	Owner	North Addition Garden Island	Lot 10 Block 6	Nov. 1930

[Endorsed] : Filed Nov. 9, 1948.

RESOLUTION

re: Annexation, North Fairbanks

Whereas, a majority of the owners of substantial interests in property in those areas adjacent and contiguous to the North boundary of the Town of Fairbanks, Alaska, have signed a petition for the annexation of those areas to the Town of Fairbanks, Alaska; and

Whereas, said area has been surveyed and a plat thereof made; and it is the desire of the Town of Fairbanks to annex said area, Now, Therefore

It Is Hereby Resolved that it is the desire of the Town of Fairbanks, Alaska, a municipal corporation, to enlarge the limits of said city by annexing the territory contiguous thereto on the north commonly known as Slaterville, North Fairbanks and Garden Island as more particularly described in a plat thereof and in the petition for annexation thereof this day presented to the Council of said Town; and it is Further Resolved that said particular petition be verified by the Mayor and filed in the District Court for the Fourth Division of the Territory of Alaska; and the officers of said Town are hereby directed to take all steps necessary to cause said annexation of said areas to be accomplished.

/s/ RAY KOHLER,
Mayor.

Passed: November 8, 1948.

Approved: November 8, 1948.

Attest:

[Seal] /s/ E. A. TONSETH,
Municipal Clerk.

I hereby certify that the foregoing is a full, true and correct copy of the resolution relating to the annexation of North Fairbanks adopted by the Common Council of the Town of Fairbanks, Alaska in regular meeting assembled on the 8th day of November, 1948, and now appearing among the minutes of said meeting.

Dated: at Fairbanks, Alaska this 10th day of November, 1948.

[Seal] /s/ E. A. TONSETH,
Municipal Clerk.

[Corporate Seal]

[Endorsed]: Filed Nov. 10, 1948.

[Title of District Court and Cause.]

ORDER FIXING HEARING

This matter coming on duly and regularly to be heard this day upon the Petition of the Town of Fairbanks, in the matter of the Annexation of certain lands known as "Slaterville," "Garden Island" and "North Fairbanks," for the entry herein of an Order setting a time and place for the hearing of said Petition and providing notice thereof and the Court finding from said Petition as follows:

a) That it is verified by the Mayor and a resident of the area proposed to be annexed and supported by the signatures of persons alleged to be the majority of the owners of substantial interests in lands, rights in land and improvements on lands within the territory proposed to be annexed,

b) That said Petition sets forth the metes and bounds of the territory sought to be annexed and is accompanied by a plat alleged to be based on actual surveys by competent engineers; that said Petition alleges the number of inhabitants within the area proposed to be annexed, and the number of owners of substantial interests in property in said area; and

c) That said Petition contains the allegation of all facts deemed by the Court requisite to a proper determination thereof; Now Therefore

It Is Hereby Ordered That the Petition of the Town of Fairbanks, a municipal corporation, for the annexation of certain lands known as "Slaterville," "Garden Island" and "North Fairbanks," be and the same is hereby set for hearing before the above entitled Court on the 9th day of December, 1948, at the hour of 2 o'clock p.m., in the courtroom of said Court in the Federal Building in the Town of Fairbanks, Territory of Alaska; and all persons interested therein are directed to appear at that time and place, to show cause, if any they have, that said Petition is unreasonable, said annexation unjust, that there exists private rights that will be

injured thereby, or any other reason why said Petition should not be granted and an order entered submitting the question of annexation to the electors of said municipality and the areas sought by said Petition to be annexed.

It is further ordered that notice of the time and place of the hearing of this Petition shall be given by posting and publishing a notice thereof under the heading of this cause in this Court, describing the land sought to be annexed, specifying the time and place of hearing, and directing all persons interested therein to attend and show cause, if any they have, why the relief requested in said Petition should not be granted.

It is further ordered that said notice shall be posted in the following three places in the Town of Fairbanks, Alaska, they being deemed the most public places in said town:

The bulletin board in the entrance to the United States Post Office;

The bulletin board on the Red Cross Building between First and Second Avenues on Cushman Street; and

The bulletin board on the entrance to the City Hall on the corner of Fifth and Cushman Streets, and in the following three places within the territory sought to be annexed:

At the Scale Building of the Healy Coal Bunkers on Illinois Street on Garden Island;

At the entrance of the office of the Fairbanks Lumber Supply on Illinois Street on Garden Island; and

On the telephone pole at the intersection of Betty and Slater Streets,

and that said notice be published at least three times in the Fairbanks Daily News Miner, a newspaper published in the Town of Fairbanks, Alaska.

It is further ordered that all of said notices be posted not less than four weeks prior to the date upon which said hearing will be held, and that said notice be first published in said newspapers not less than four weeks prior to the date upon which said hearing will be held.

Dated at Fairbanks, Alaska this 9th day of November, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered Nov. 9, 1948.

[Endorsed]: Filed Nov. 9, 1948.

[Title of District Court and Cause.]

ANSWER TO PETITION AND ORDER
TO SHOW CAUSE

Now comes protestant United States Smelting Refining and Mining Company, and in answer to the petition and the order to show cause heretofore entered and dated November 9, 1948, respectfully shows:

1. Alleges that it is the owner of substantial property rights of considerable value, and substantial property interests in land and possessory rights in land and improvements upon land within the alleged limits of the territory sought to be annexed by the petition of the Town of Fairbanks heretofore filed herein, and said property rights, property interests and possessory rights include, among others, lands, office buildings, a power plant, shops, garages, warehouses, dwelling houses, and other buildings; in and about said lands protestant conducts a large and extensive business of gold mining and other operations incidental thereto, and has invested large sums in connection with said business and the acquisition of said properties.

2. Protestant denies the allegations of paragraphs II, III, IV, V and VI of said petition.

3. Protestant denies the allegations of paragraph VII of said petition and in that respect alleges that the territory sought to be annexed is only partly developed as a residential area, that said residential area so developed and blocked off into streets does not exceed 71 acres in area of the territory sought to be annexed, and that the remaining portion of said territory is industrial land, occupied to some extent for the purposes of heavy industry and business, and will not be developed as a residential area for many years, if at all.

Protestant further alleges that the assessed value of the territory sought to be annexed is in excess

of \$2,900,000, and the assessed value of protestant's property in said territory is in excess of \$1,775,000.

Protestant further alleges that it has private rights that will be injured by said annexation and that it is unjust and unreasonable that said territory be annexed to the Town of Fairbanks.

Protestant further alleges that there is little or no benefit to this protestant in said annexation; that this protestant does not sell any of its products in the Town of Fairbanks but, on the contrary, spends large sums of money therein for its own necessary materials and supplies aggregating large sums each year, and alleges that the property of this protestant will be subject to heavy and excessive taxation far exceeding the slight benefit to be derived by protestant from said annexation, if said petition be granted and said territory be annexed to said Town of Fairbanks.

4. Protestant alleges that one or more of the signers of said petition are not owners of substantial property rights or substantial property interests in land or possessory rights in land or improvements upon land within the alleged limits of the territory sought to be annexed.

5. Protestant alleges that sections 2419 and 2421 of the Compiled Laws of Alaska, 1933, are unconstitutional and void in that they constitute an unlawful delegation of legislative power to the district court of the Territory of Alaska, and contravene the Fifth and Fourteenth Amendments to the

United States Constitution and the Organic Act of Alaska.

6. Protestant alleges that sections 2419 and 2421 of the Compiled Laws of Alaska, 1933, are unconstitutional and void in that they impose nonjudicial functions on the district court for the Territory of Alaska, contrary to sections 3 and 4 of the Organic Act of the Territory of Alaska, August 24, 1913 (48 U.S.C. 23, 72, 80; C.L.A. (1933), sec. 463, 465, 485), as amended by the Act of August 29, 1914 (48 U.S.C. 91; C.L.A. (1933), sec 486), and to sections 4 and 698 of the Act of June 6, 1900 (48 U.S.C. 101), as amended.

7. Protestant further alleges that sections 2419, 2421 and 2425 of the Compiled Laws of Alaska, 1933, are unconstitutional and void and contravene the Fifth and Fourteenth Amendments to the United States Constitution and the Organic Act of Alaska by reason of their vagueness, uncertainty and indefiniteness.

8. Protestant further alleges that the entertaining and granting of said petition will deprive protestant of its property without due process of law, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, and will deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that sections 2419, 2421 and 2425 of the Compiled Laws of Alaska, 1933, under which said petition is brought, improp-

erly purport to delegate legislative power to the district court for the Territory of Alaska and are vague, uncertain and indefinite.

9. Protestant alleges that the district court, for the reasons hereinabove mentioned, has no jurisdiction to hear, allow, or otherwise entertain the petition filed in this proceeding by the Town of Fairbanks.

Wherefore, this protestant prays that said petition be hence dismissed, for its costs of suit herein incurred, and for such other relief as is meet and proper in the premises.

/s/ SOUTHALL R. PFUND,

/s/ JULIEN A. HURLEY,

Attorneys for United States Smelting, Refining
and Mining Company.

We certify the foregoing to be a true copy of the original document filed herein.

/s/ SOUTHALL R. PFUND,

/s/ JULIEN A. HURLEY.

Service of a copy of the foregoing answer to petition and order to show cause is hereby acknowledged this 22nd day of April, 1949.

COLLINS & CLASBY,

Attorneys for Town of
Fairbanks.

Town of Fairbanks,
Territory of Alaska—ss.

Roy B. Earling, being first duly sworn on oath
says:

I am an officer, to wit, a vice president of United
States Smelting Refining and Mining Company, a
Maine corporation, the protestant and objector in
the above-entitled action, and make this verification
on its behalf; I have read the foregoing answer
of protestant, know the contents thereof, and the
same is true as I verily believe.

/s/ ROY B. EARLING.

Subscribed and sworn to before me this 7th day
of December, 1948.

[Seal] /s/ HERTHA N. BAKER,
Notary Public in and for the
Territory of Alaska.

My Commission Expires February 28, 1949.

[Endorsed]:Filed Apr. 22, 1949.

[Title of District Court and Cause.]

ANSWER TO PETITION AND ORDER
TO SHOW CAUSE

Comes now protestant Charles Slater, and in answer to the Petition and Order to Show Cause heretofore filed and entered herein and dated November 9, 1948, respectfully shows:

I.

Alleges that he is the owner of substantial property rights of not much value, and substantial property interests in land and possessory rights in land and improvements upon land within the alleged limits of the territory sought to be annexed by the petition of the Town of Fairbanks heretofore filed herein, and said property rights and property-interests include approximately twelve (12) acres of farm land which is valuable only for farm purposes, except that it is now leased to the Federal Government for the sum of Sixty Dollars (\$60.00) per month and is being used by the United States Army. That said land will not be benefited by being included within the limits of the Town of Fairbanks, Alaska for the reason that the United States Army has provided water and sewage for its own use, and that the taxes that would be imposed by the Town of Fairbanks, Alaska, which protestant would be compelled to pay, would be in excess of the income derived by him from said land, and he would derive no benefit

whatever, either as to fire protection, sewage or lights for the reason that said lands are unimproved and could be used only for rental and farm purposes, or for occupancy by the United States Army, for which they are now rented.

II.

Protestant denies the allegations contained in Paragraphs II, III, V, VI and VII of said Petition.

III.

Protestant alleges that said territory sought to be annexed is only partly developed as a residential area and that said residential area so developed and blocked off in streets does not exceed one-third in area of the territory sought to be annexed.

IV.

Protestant alleges that this protestant has private rights which will be injured by said annexation and that it is unjust and unreasonable that said territory be annexed to the Town of Fairbanks, Alaska.

V.

Protestant alleges that there are more than three hundred and ten (310) owners of substantial property interests in land or possessory rights in land, tideland or improvements upon land or tideland within the limits of the territory described in said Petition and proposed to be annexed to the Town of Fairbanks, Alaska.

VI.

Protestant further alleges that there are less than one hundred and forty (140) owners of substantial property interests in land or possessory rights in land or improvements upon land within the limits of the territory sought to be annexed by said Petition to the Town of Fairbanks, Alaska who have signed said Petition, and the persons signing said Petition constitute less than fifty per cent (50%) of the owners of substantial property interests in land or possessory rights in land or improvements upon land within the limits of the territory as described in said Petition.

VII.

Protestant alleges that the District Court, for the reasons hereinabove mentioned, has no jurisdiction to hear, allow or otherwise entertain the Petition filed in this proceeding by the Town of Fairbanks, Alaska.

Wherefore, this protestant prays that said Petition be dismissed, and for his costs and disbursements herein and for a reasonable sum to be allowed as an attorney fee, and for such other relief as is just and equitable.

JULIEN A. HURLEY,
Attorney for Protestant
Charles Slater.

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Charles Slater, being first duly sworn upon oath,
deposes and says:

That I am the protestant and objector in the
above entitled action; that I have read the fore-
going Answer to Petition and Order to Show
Cause, know the contents thereof, and the same is
true as I verily believe.

CHARLES SLATER.

Subscribed and sworn to before me this 9th day
of December, 1948.

[Seal] JULIEN A. HURLEY,
Notary Public in and for the Territory of Alaska.
My Commission Expires June 12, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1949.

[Title of District Court and Cause.]

REPLY TO ANSWER OF PROTESTANT
UNITED STATES SMELTING REFINING
AND MINING COMPANY

Comes Now the Petitioner and for reply to the
Affirmative matter contained in the Answer of
Protestant United States Smelting Refining and
Mining Company, admits, denies and alleges as
follows:

I.

For answer to paragraph 1 of Protestant's answer petitioner denies that said Protestant conducts a large and extensive business of gold mining on any of the properties embraced in the area by said petition sought to be annexed; and admits all other allegations in said paragraph contained.

II.

For answer to paragraph 3 of said answer petitioner denies that protestant has any private rights that will be injured by said annexation and that it is unjust and unreasonable that said territory be annexed to the Town of Fairbanks, Alaska; denies that annexation is of no benefit to protestant, admits that protestant does not sell any of its products in the Town of Fairbanks, Alaska and alleges that by law it is required to sell its products to the Treasury of the United States, or licensed dealers in gold; denies that anything over a barely perceptible percentage of its purchases are made in the Town of Fairbanks, deny that protestant's property will be subject to heavy and excessive taxation, or any taxation over the legal rate or other than on equalized values at a uniform rate with similar property, and denies that protestants will not benefit thereby to the same extent as any taxpayer; and for further answer to said paragraph petitioner alleges that protestant established its buildings, shops, warehouses and power plant adjacent to the Town of Fairbanks about 20 years

ago, and since then residential and industrial development in excess of \$2,000,000.00 current appraised value has filled the area sought to be annexed, other than occupied by protestant. That in the area sought to be annexed there are no retail outlets, schools, or utility services. The Protestant employs in excess of 600 persons in season, drawing largely on Fairbanks for its pool of labor. That without the Town of Fairbanks protestant's labor costs would be sharply increased, and it forced to maintain schools, utilities, housing, retail outlets, personal service businesses and many other functions at its own cost for the convenience of its employees.

III.

Denies the allegations contained in paragraphs V, VI, VII, VIII and IX of said answer.

Wherefore, Petitioner Prays for the Relief Requested in Its Petition.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY.

United States of America,
Territory of Alaska—ss.

Ray Kohler, being first duly sworn, on his oath deposes and says: That I am the Mayor of the Town of Fairbanks, Alaska, a municipal corporation, and subscribe to this verification on behalf of said Town under authority so to do given by the Council of the said Town; That I have read the

within and foregoing Reply to Answer of Protestant, United States Smelting, Refining and Mining Company, know the contents thereof and that the same are true and correct as I verily believe.

/s/ RAY KOHLER.

Subscribed and Sworn to before me this 27th day of April, 1949.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for
Alaska.

My commission expires June 10, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

REPLY TO ANSWER OF PROTESTANT
CHARLES SLATER

Comes Now the Petitioner and for reply to the affirmative matter contained in the Answer of protestant Charles Slater admits, denies and alleges as follows:

I.

Denies each and every allegation contained in paragraphs I, III, IV, V, VI and VII of protestant's answer.

Wherefore, Petitioner having fully replies to the

answer filed herein prays for the relief requested in its petition.

COLLINS & CLASBY,
By CHAS. J. CLASBY,
Attorneys for Petitioner.

United States of America,
Territory of Alaska—ss.

Ray Kohler, being first duly sworn, on his oath deposes and says: That I am the Mayor of the Town of Fairbanks, Alaska, a municipal corporation, and subscribe to this verification on behalf of said Town under authority so to do given by the Council of the said Town; That I have read the within and foregoing Reply to Answer of Protestant, Charles Slater, know the contents thereof and that the same are true and correct as I verily believe.

RAY KOHLER.

Subscribed and Sworn to before me this 27th day of April, 1949.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for
Alaska.

My commission expires June 10, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed April 27, 1949.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: All Electors of the Town of Fairbanks, Alaska, a Municipal Corporation, all Electors and Owners of substantial property interests in the area hereinafter described and to all persons interested therein:

You Are Hereby Notified That the Petition of the Town of Fairbanks, a Municipal corporation, for the annexation to the Town of Fairbanks, of the following described area to wit:

Beginning at a meander corner No. 1 of the plat of a survey for the proposed addition to the Townsite of Fairbanks, Alaska, dated July, 1947, said point being meander corner No. 7 of U. S. Survey No. 806, as amended April 16, 1920, and situate on the south meander line of Noyes Slough; thence meandering said Noyes Slough upstream, S. $70^{\circ}17'$ E. 418.9 ft. to meander corner No. 2; S. $78^{\circ}39'$ E. 300.0 ft. to meander corner No. 3; S. $48^{\circ}51'$ E. 258.0 ft. to meander corner No. 4; S. $26^{\circ}18'$ E. 286.0 ft. to meander corner No. 5; S. $40^{\circ}59'$ E. 152.37 ft. to meander corner No. 6; S. $30^{\circ}43'$ E. 165.0 ft. to meander corner No. 7; S. $12^{\circ}51'$ W. 50.0 ft. to meander corner No. 8; S. $34^{\circ}49'$ W. 98.5 ft. to meander corner No. 9; S. $60^{\circ}45'$ W. 84.0 ft. to meander corner No. 10; S. $74^{\circ}40'$ W. 188.0 ft. to meander corner No. 11; N. $47^{\circ}28'$ W. 32.2 ft. to meander corner No. 12; N. $83^{\circ}58'$ W. 147.4 ft. to meander corner

number 13; N. $88^{\circ}58'$ W. 100.0 ft. to meander corner No. 14; S. $59^{\circ}56'$ W. 220.2 ft. to meander corner No. 15; S. $52^{\circ}40'$ W. 304.87 ft. to meander corner No. 16; S. $30^{\circ}51'$ W. 228.1 ft. to meander corner No. 17 at which point the meander line of Noyes Slough joins the north meander line of the Chena River; thence meandering said Chena River downstream, S. $79^{\circ}50'$ W. 305.18 ft. to meander corner No. 18; S. $68^{\circ}51'$ W. 156.65 ft. to meander corner No. 19; S. $47^{\circ}34'$ W. 233.94 ft. to meander corner No. 20; S. $40^{\circ}45'$ W. 258.25 ft. to meander corner No. 21 situate at the junction of the meander lines of the Chena River and Garden Island Slough, said meander corner No. 21 being the N. E. corner of the present Fairbanks Townsite boundary; thence meandering said Garden Island Slough downstream along the said Fairbanks Townsite Boundary, N. $47^{\circ}53'$ W. 178.96 ft. to meander corner No. 22; N. $64^{\circ}19'$ W. 35.73 ft. to meander corner No. 23; N. $50^{\circ}07'$ W. 214.14 ft. to meander corner No. 24; N. $55^{\circ}35'$ W. 221.8 ft. to meander corner No. 25; N. $64^{\circ}53'$ W. 187.96 ft. to meander corner No. 26; N. $74^{\circ}24'$ W. 188.71 ft. to meander corner No. 27; S. $83^{\circ}55'$ W. 249.75 ft. to meander corner No. 28, said corner No. 28 being corner No. 5 of U. S. Survey No. 847; thence S. $47^{\circ}21'$ E. 101.64 ft. to meander corner No. 29; thence S. $10^{\circ}44'$ E. 496.32 ft. to meander corner No. 30; thence S. $10^{\circ}30'$ E. 60.06 ft. to meander corner No. 31; thence S. $17^{\circ}06'$ W. 495.0 ft. to meander corner No. 32; said meander corner No. 32 being corner No. 4 of U. S. Survey No. 847; thence N.

49°45' W. 613.8 ft. to meander corner No. 33; thence N. 49°47' W. 140.02 ft. to meander corner No. 34; thence N. 32°23' W. 575.12 ft. to meander corner No. 35; thence N. 48°02' E. 596.35 ft. to meander corner No. 36; thence N. 25°14' E. 2,368.02 ft. to meander corner No. 37; thence N. 76°04' E. 524.6 ft. to meander corner No. 38; thence S. 24°51' E. 533.2 ft. to meander corner No. 39; thence S. 39°00' E. 198.0 to meander corner No. 40; thence S. 44°30' E. 554.4 ft. to meander corner No. 1 and the point of beginning,

being that area contiguous to the north boundary of the Town of Fairbanks, Alaska, known as "Slaterville," "Garden Island," and "North Fairbanks," will be brought on for hearing before the above-entitled Court in the Courtroom of said Court in the Federal Building in the Town of Fairbanks, Alaska, on the 9th day of December, 1948, at the hour of 2 o'clock p.m.

You Are Commanded to then and there appear, and show cause, if any you have, why said Petition should not be granted and an order entered providing for the submission of the annexation of said Territory to the Town of Fairbanks to the electors of said Town of Fairbanks and of the area by said Petition sought to be annexed.

Dated: This 9th day of November, 1948.

JOHN B. HALL,

[Seal] /s/ JOHN B. HALL,

Clerk, District Court.

[Title of District Court and Cause.]

MARSHAL'S RETURN OF SERVICE
OF NOTICE OF HEARING

I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Division do hereby certify and return that I received the hereto attached original Notice of Hearing issued by the Clerk of Court in the above-entitled matter at Fairbanks, Alaska, on the 9th day of November, 1948, and that thereafter on the 9th day of November, 1948, I duly served the same by posting a full, true and correct copy of the Notice of Hearing hereto attached in the following places, to wit:

In the Town of Fairbanks:

(a) Bulletin Board entrance to U. S. Post Office;

(b) Bulletin Board on the Red Cross Building between First and Second Avenues on Cushman Street;

(c) Bulletin Board entrance to the City Hall, corner 5th and Cushman Streets.

In Area described in Notice:

(d) In the Scale Building of the Healy Coal Bunkers on Illinois Street in Garden Island;

(e) At the entrance of the office of the Fairbanks Lumber Supply on Illinois Street in Garden Island;

(f) On the telephone pole at the intersection of Betty and Slater Streets in Slaterville.

Dated at Fairbanks, Alaska, this 10th day of November, 1948.

STANLEY J. NICHOLS,

United States Marshal.

By /s/ THOMAS P. COX,

Deputy.

[Endorsed]: Filed Nov. 10, 1949.

AFFIDAVIT OF PUBLICATION

United States of America,

Territory of Alaska, Fourth Division—ss.

Before me, the undersigned, a notary public, this day personally appeared William C. Strand, Jr., who, being first duly sworn, according to law, says that he is the Editor of The Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth Division and Territory, and that the advertisement, of which the annexed is a true copy, was published in said paper on the 9th day of November, 1948, and once each week Thereafter for 3 consecutive weeks, the last publication appearing on the 30th day of November, 1948, and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

/s/ WILLIAM C. STRAND, JR.

Subscribed and sworn to before me this 17th day of May, 1949.

[Seal] /s/ PHILIP A. JOHNSON,

Notary Public.

My Commission expires 3 Sept., 1949.

[Endorsed]: Filed May 23, 1949.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 6032

In the Matter of:

The Annexation of Certain Lands Known as
“Slaterville,” “Garden Island” and “North
Fairbanks”

To: THE TOWN OF FAIRBANKS, ALASKA, a
Municipal Corporation.

JUDGMENT

This cause coming on for trial before the above-entitled Court on the 23rd day of May, 1949, and the Town of Fairbanks, the Petitioner herein, appearing by and through its attorney, Charles J. Clasby, and the Protestants, Charles Slater and the United States Smelting Refining and Mining Company, appearing by and through their attorney, Julien A. Hurley, and the Petitioner having introduced evidence in support of its said petition and having rested its case, and the said attorney for the said

Protestants having made a motion for a non-suit for the reason that the said Petitioner had failed to prove that a majority of the owners of substantial property interests in land, or possession in land, or improvements upon land, in the area described in said petition, had signed said petition, and the Court having allowed said motion for a non-suit and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered and Adjudged that said petition be, and the same is, hereby dismissed, and that the said Protestants, Charles Slater and the United States Smelting Refining and Mining Company recover from the said Town of Fairbanks, Alaska, their costs and disbursements herein to be taxed by the Clerk of the Court, in the sum of \$....., but without attorney's fee (HEP), and that execution issue therefor.

Dated this 31st day of May, 1949.

/s/ HARRY E. PRATT,
District Judge.

Entered May 31, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States Smelting, Mining and Refining Company, Charles Slater, Protestants, and Julian A. Hurley and Southall R. Pfund, their attorneys:

You are hereby notified that petitioner in the above-described proceeding hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, from the final judgment, made and entered in this action in the above-entitled Court on the 31st day of May, 1949, in favor of protestants and against petitioner, wherein it was ordered and adjudged that the petition be dismissed.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

STIPULATION RE: PRINTING OF RECORD

It is hereby stipulated by and between the above-named parties, Petitioner and Protestants, through their respective Attorneys, that in printing the papers and records to be used on the hearing on appeal in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and Cause in full on all papers shall be omitted, except on the first page of said record and that there shall be inserted in place of said title on all papers used as a part of said records the words "Title of Court and Cause." Also that all endorsements on said papers used as a part of said record shall be omitted, except the Clerk's file marks and the admission of service.

Dated at Fairbanks, Alaska, this 15th day of June, 1949.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Petitioner and
Appellant.

/s/ JULIEN A. HURLEY, of

Attorneys for Protestants
and Appellees.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The Petitioner, Town of Fairbanks, Alaska, a municipal corporation organized and existing in the Territory of Alaska, considering itself aggrieved by the judgment of this Court, made and entered in the above-entitled action on the 31st day of May, 1949, in favor of the Protestants, the United States Smelting, Refining and Mining Company, Inc., and Charles Slater, and against said Petitioner, wherein it was ordered and adjudged that the petition of Petitioner for the annexation to it of the area described in said petition be dismissed upon the allowance by the Court of a motion by Protestants for a non-suit, does hereby appeal from said judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified and set forth in the Assignments of Error which is filed herewith and the said Petitioner prays that this appeal be allowed and that a transcript of the record, proceedings and papers, upon which the said judgment was made, duly authenticated by the Clerk of this Court, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 14th day of June, 1949.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now petitioner and alleges that the judgment of the above-entitled Court, entered in the above-entitled cause on the 31st day of May, 1949, is erroneous and unjust to it, and file with its Petition for an Allowance of Appeal the following assignments of error upon which it will reply:

I.

The Court erred in granting protestants motion for the entry of an order of non-suit and ordering dismissal of the petition, the proceedings relating thereto being as follows:

“That evidence was presented by the petitioners, and at the close of their evidence, the following motion was made:

“Mr. Hurley: We move at this time, on behalf of the protestants, United States Smelting, Refining and Mining Company and Charles Slater—I desire to move for a non-suit, and ask that the petition be dismissed for the reason that the petition alleges that there are 282 owners of substantial property interests in land or improvements upon land in the Territory above described and sought by this petition to be annexed to the town of Fairbanks, Alaska. We admit that, and allege that there are more than 310 owners.

“Now, the statute says that a petition must be filed with a majority of the owners of substantial

property interests in land or possession in land or improvements upon land within the proposed territory. Now, they have proven that there were 106 people who signed this petition who claimed to have a substantial property interest in land within the area, but according to their own allegations which we admit of 282, although we do say there is more than 310, there would have to be 142 signers on the petition who were qualified signers as owners of property—substantial property rights or interest in land proposed to be annexed.

“Now, they made no attempt to show that they have the required number. The petition, itself, shows that there are 149 signers, and only 106 of these have been shown to have any interest of any kind in property interest in the land proposed to be annexed. Now, on cross-examination I have shown that there are at least 28 who do not have anything recorded in the Land Office to show that they claim any substantial right in land, that they are either owners, lessees or are claiming or holding under lease or contract of sale, so they have entirely failed to prove a majority which they allege. When they allege the number and which they say have signed the petition. They have made no attempt to show that there is a majority of the 282 owners of substantial property interest whom they say have a right to sign the petition in the proposed area. Now, there is nothing that I know of in the law that says under a section like we have here that all they have to do is to file a petition and say that they

have got 53 per cent of the people qualified to sign it.

“It says in the law ‘a petition signed by a majority of the owners of substantial property interests in land or possessory rights in lands, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, and stating the number of inhabitants therein, as well as the number of owners of property therein situate. And they shall file such a petition in the District Court.’ Well, now, they allege that, and they allege the number who have the right to sign and they allege that 53 per cent have signed.

“Now, the burden of proof is certainly on them to show at least by some kind of evidence that these people that signed the petition were qualified, but they come in and show that 106 signed that they claimed were qualified to sign, but their petition shows that they had to have 142, according to their own allegations, and at least 155, according to our allegations—our Affirmative Defense, so it seems to me there has been a total failure of proof. I think a non-suit should be granted.

“Mr. Clasby: May it please the Court, while it is true that the petition alleges that there are 282 owners of substantial property interests in the area sought to be annexed, that was a matter we must prove, and we brought in the best evidence we could to prove our allegations. Our allegation was in error, and we proved the number of owners of substantial property interests within the area proposed to be annexed, and proved it to be 207. It went in

without objection from any source, insofar as constituting an amendment to the petition; as far as that is concerned it would constitute an amendment to the petition. Now, we are relying upon the registrations as showing what the 100 per cent is, and that figure, according to the testimony, is 207. Now, the Code says: 'Those owners of land within the limits of the territory sought to be annexed, who have filed a statement of their ownership in the United States General Land Office in the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945, shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary.'

"Therefore, according to that section of the Code, the total number of the persons having property within the area who have registered them, are those owners of substantial interests in property which are to be considered in testing whether or not this petition is sufficient. That number, as I have said, is 207, and we have shown by affirmative testimony that the petition is supported by 106 of those persons, and it is obvious that that is a majority of those persons who are, according to this section, the persons owning substantial interest in property within the area sought to be annexed. They are presumed to be the ones, and the statute does leave

it up to the defense on a clear showing that there are others; to have others counted, but until that is done, why it doesn't seem to be a burden of proof upon the City, or upon the proponents of this annexation. This statute gives the description of what shall be called the one hundred per cent.

“Mr. Hurley: If the Court please, all that part of the statute does is to go ahead and say that when they have registered in the Land Office, it shall be *prima facie* evidence of ownership, but it is not conclusive. That, in itself, is not conclusive, and they cannot come in after they allege 282 qualified and we admit that and allege that there are 310, they can't come in and say because they come in and show that by *prima facie* evidence there is 107 and say we have consented to that being the number. We never consented to anything. We admit—they allege it and we admit it, and they are bound by the allegations of their Complaint, and they never asked to amend. They never even asked to amend their Complaint to change the claim it was necessary for them to have 142, and they come in with their petition with some 148 names on it, and now they say that these people they had sign this petition had no right to sign it. I can't understand their theory, your Honor. I admit a lot of them didn't have, but I don't admit there wasn't at least 103 or 104 of them, or even more than that, according to our figures they had to have 155 signers to have a valid petition. People that we have checked on, and know have valid property interests in land and

they are entitled to vote, or were entitled to sign the petition.

“The Court: Well, their allegations were 282 owners of substantial property interests. Why naturally it is up to them to prove that. The fact that they showed there were 207 who registered shows that there were that many that registered, but it doesn't show that there are others who owned interest in the area and who have failed to register, so the motion is well taken and will be granted. The petition is dismissed.”

II.

The Court erred in making and entering judgment against the Petitioner ordering that the same be dismissed, the same being contrary to the law and the evidence in the respect in these Assignments of Error detailed.

Wherefore, Petitioner prays that said judgment be reversed and the cause remanded for a new trial in accordance with the law.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF COST BOND

Now, on this 17th day of June, 1949, the same being one of the days of the General May, 1949, Term of this Court, this cause came on regularly to be heard upon the petition of the Town of Fairbanks, a municipal corporation, petitioner in the above described cause, for the allowance of an appeal in behalf of said petitioner from the final judgment entered in this cause on the 31st day of May, 1949, and for the fixing of the amount of the Cost Bond on said appeal.

Now, Therefore, It Is Ordered That the Appeal of said petitioner from the final judgment entered herein on the 31st day of May, 1949, be and is hereby allowed to the United States Court of Appeals for the Ninth Circuit, and that a certified copy of the transcript of record, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said judgment appealed from is based, be transferred, duly authenticated, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered that the amount of the Cost Bond herein be, and the same is hereby fixed at the sum of Two Hundred Fifty Dollars (\$250.00).

Dated at Fairbanks, Alaska, this 17th day of June, 1949.

HARRY E. PRATT,
District Judge.

Entered June 17, 1949.

Presented by:

CHAS. J. CLASBY,

One of the Attorneys for
Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause.]

CITATION OF APPEAL

To the President of the United States of America

To: The Protestants, United States Smelting, Refining and Mining Company, Inc., and Charles Slater, and to their Attorneys Julien A. Hurley and Southall R. Pfund.

You are hereby cited to be and appear in the United States Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, with forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above-entitled cause on this day, in which the Petitioner, the Town of Fairbanks, Alaska, a municipal corporation, is petitioner and appellant, and the United States Smelting, Refining and Mining Company, Inc., and Charles Slater are protestants and appellees, to show cause, if any there be, why the judgment made and entered in this cause on the 31st day of May, 1949, in favor of appellees and against appellant herein should not be set aside and reversed, and why speedy justice should not be

done to said petitioner and appellant above named in that behalf.

Witness the Honorable Fred A. Vinson, Chief Justice of the Supreme Court of the United States of America, on this 17th day of June, 1949.

HARRY E. PRATT,
District Judge.

Entered June 17, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That, We, the Town of Fairbanks, a municipal corporation, as principal, and Reuel M. Griffin and R. M. Fenton, as sureties, all of Fairbanks, Alaska, are held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States of America, to be paid to the said United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of June, 1949.

The condition of the above obligation is such that:

Whereas the above bounden Town of Fairbanks,

Alaska, has filed its Petition for appeal and are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment in favor of the Protestants, United States Smelting, Mining and Refining Company, Inc., and Charles Slater, entered in the above entitled Court and cause on the 31st day of May, 1949, whereby it was adjudged that the petition of the Town of Fairbanks be dismissed and awarding to said Protestants their costs and disbursements; and

Whereas said Petitioner desires to appeal from said Judgment and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said Judgment, and have given Protestants in said action, Notice of Appeal as required by law, and said Court having duly fixed the amount of Cost Bond at Two Hundred Fifty Dollars (\$250.00);

Now, Therefore, if Petitioner above named should prosecute said appeal to effect, and answer all costs that may be adjudged against it if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

TOWN OF FAIRBANKS,

A Municipal Corporation.

By **RAY KOHLER,**

Mayor.

Attest:

[Corporate Seal] E. A. TONSETH,
Municipal Clerk.
Principal
REUEL M. GRIFFIN,
R. M. FENTON,
Sureties.

United States of America,
Territory of Alaska—ss.

Reuel M. Griffin and R. M. Fenton being first duly sworn on oath, each for himself, deposes and says:

I am a resident of Fairbanks, in the Fourth Judicial Division in the Territory of Alaska, that I am not an Attorney, Counsel at Law, Judge, Marshal, Clerk, Commissioner, or other officer of any Court; that I am worth the sum of Five Hundred Dollars (\$500.00), over and above all my just debts and obligations, in property not exempt from execution, situate in the Territory of Alaska.

REUEL M. GRIFFIN,
R. M. FENTON.

Subscribed and sworn to before me this 20th day of June, 1949.

(Seal) CHAS. J. CLASBY,
Notary Public in and for the Territory of Alaska.
My Commission expires: April 11, 1952.

Approved:

JULIEN A. HURLEY,
Of Attorneys for
Protestants.

The foregoing bond is hereby approved this 23rd day of June, 1949.

HARRY E. PRATT,
District Judge.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

STIPULATION RE: SETTLING BILL OF EX-
PECTATIONS AND DOCKETING APPEAL

It is hereby stipulated by and between Petitioner and Protestants by their respective counsels that Petitioner may be granted by order of the Court to and including the 15th day of September, 1949, within which to settle the Bill of Expectations and docket this case in the United States Court of Appeals for the Ninth Circuit.

Dated at Fairbanks, Alaska, this 20th day of June, 1949.

· COLLINS & CLASBY,
By /s/ CHAS. J. CLASBY,
Attorneys for Petitioner.
/s/ JULIEN A. HURLEY,
Counsel for Protestants.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR SETTLING
BILL OF EXPECTATIONS AND DOCKET-
ING APPEAL

On oral motion of Counsel for Petitioner, and the Court finding that it will be on vacation from July 20 to approximately September 5, it is hereby ordered that the time for settling bill of expectations and docketing this cause on appeal before the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 15th day of September, 1949.

Done in open Court this 23rd day of June, 1949.

/s/ HARRY E. PRATT,

District Judge.

Entered June 23, 1949.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

STIPULATION FIXING TRANSCRIPT OF
TRIAL AS BILL OF EXCEPTIONS

Comes Now Petitioner by and through its attorneys, Collins & Clasby, and protestants, through their attorney, Julien A. Hurley, and stipulate and agree that the Transcript of Trial (testimony), prepared, certified and filed herein by the Court Reporter, be deemed and taken to be the Bill of Exceptions in this cause, usable by the parties and the Appellate Court as such as fully as if settled and signed by the Judge of this Court as the Bill of Exceptions.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Petitioner,

Appellant.

/s/ JULIEN A. HURLEY,

Of Attorney for Protestants,

Appellee.

[Endorsed]: Filed July 21, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: John B. Hall, Clerk of the above-entitled Court.

You will please prepare transcript of record in the above entitled cause, to be filed in the Office of the Clerk of the United States Court of Appeals

for the Ninth Circuit sitting in San Francisco, California, upon the appeal heretofore perfected at said Court, and include therein the following papers and records:

1. Petition.
2. Resolution re Annexation of North Fairbanks.
3. Order Fixing Hearing.
4. Notice of Hearing.
5. Marshal's Return of Service of Notice of Hearing.
6. Affidavit of Publication of Notice of Hearing.
7. Answer of United States Smelting, Mining & Refining Company.
8. Answer of Charles Slater.
9. Reply to Answer of United States Smelting, Refining and Mining Company.
10. Reply to Answer of Charles Slater.
11. Transcript of Trial.
12. Judgment.
13. Notice of Appeal.
14. Stipulation re Printing of Record.
15. Petition for Allowance of Appeal.
16. Assignments of Error.
17. Order Allowing Appeal and Fixing Amount of Cost Bond.
18. Cost Bond on Appeal.
19. Citation of Appeal.
20. Stipulation re: Settling Bill of Expectations and Docketing Appeal.
21. Order Extending Time for Settling Bill of Expectations and Docketing Appeal.

22. Stipulation Fixing Transcript of Trial as Bill of Exceptions.

23. Exhibit (Map attached to Petition). Exhibits "A" and "B," Trial.

24. Praecipe for Transcript of Record.

The transcript is to be prepared as required by law and the rules and orders of this Court and the United States Court of Appeals for the Ninth Circuit and should be forwarded to said Court in San Francisco so that the same can be docketed therein on or before the 15th day of September, 1949.

Dated at Fairbanks, Alaska, this 25th day of August, 1949.

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 25, 1949.

In the District Court for the Territory of Alaska,
Fourth Judicial Division
No. 6032

In the Matter of
The Annexation of Certain Lands Known as Slater-
ville, Garden Island, and North Fairbanks.
To: The Town of Fairbanks, Alaska, a municipal
corporation.

TRANSCRIPT OF TRIAL

Mr. Charles J. Clasby, of Fairbanks, Alaska, Attor-
ney for Petitioners.

Mr. Southall Pfund, of San Francisco, California,
and Mr. Julien A. Hurley, of Fairbanks,
Alaska, Attorneys for Respondents.

Be It Remembered that upon the 23rd day of
May, 1949, at 10:00 o'clock a.m., the above-entitled
cause came on regularly for trial before the Court,
the Honorable Harry E. Pratt, District Judge, pre-
siding;

And Thereupon, the following proceedings were
had:

The Court: This was the time set for hearing in
the matter of the annexation of Slaterville; Counsel
ready?

Mr. Clasby: We are ready, your Honor.

Mr. Hurley: We are ready.

The Court: Very well, proceed.

Mr. Clasby: If the Court please, I made arrange-
ments with Mr. Potter, the surveyor, as the first
witness so he could get away, and I checked with
him at a quarter of ten, and he [*39] said he would
be here at 10:00, and if we could have a few min-
utes recess, I would like to put him on—oh, here
he is now.

JOHN FRANK POTTER

was called as a witness on behalf of the petitioners,
and after being duly sworn, testified as follows:

Direct Examination

By Mr. Clasby:

Q. Would you state your full name, please?

* Page numbering appearing at bottom of page of original
Reporter's Transcript.

(Testimony of John Frank Potter.)

A. John Frank Potter.

Q. What is your residence, Mr. Potter, Fairbanks?
A. Yes, sir.

Q. How long have you lived in and near Fairbanks?
A. Eleven years.

Q. What is your business or occupation?

A. I am a Civil Engineer.

Q. Did you take some special schooling in that?

A. Yes, sir.

Q. Where did you take that schooling?

A. That schooling was the International Correspondence School for the Engineering work.

Q. I see, and did you receive a degree?

A. No, sir.

Q. And have you—when was that that you completed that schooling? [40]

A. Oh, that was about '38.

Q. 1938? Since then what has been your occupation?
A. Engineer.

Q. Any surveying?
A. Yes, sir.

Q. And what is your present occupation?

A. Well, I am still doing engineering work. I am not active at it right at the present time.

Q. And just tell us briefly since 1938 what your surveying experience has been. Name some of the tracts you have surveyed.

A. Well, I worked for the Assistant County Engineer of Powtawatomie County, and I was employed by the Kansas State Highway Commission for about two years.

(Testimony of John Frank Potter.)

Q. Doing surveying?

A. Yes, doing surveying. And after coming to Alaska I have been active in surveying and various types of engineering work for the Army, and later as a partner in the Alaska Architectural and Engineering Company.

Q. And that is a firm that holds itself out to do surveying for the public? A. Yes, sir.

Q. Was your firm employed by the Town of Fairbanks to make a survey of the area known as North Fairbanks? A. Yes, sir. [41]

Q. Can you tell us approximately when that was?

A. You mean, that the survey was completed?

Q. Yes.

A. It was, I believe, during the month of July in 1947.

Q. And did you make the survey, yourself?

A. Yes, I was in charge of the party.

Q. And did you run the instruments?

A. Yes, sir.

Q. Took the field notes? A. Yes, sir.

Q. And you had other men in your party to do the brushing and chaining? A. Yes, sir.

Q. Did you supervise the chaining?

A. Yes, sir.

Q. Did you make a map, or project your boundaries on a map? A. Yes, sir.

Mr. Clasby: I believe the plat is in the file, if the Court please. Could I use that?

(Testimony of John Frank Potter.)

Clerk of Court: Petitioner's Identification Number "1."

(Petitioner's Identification Number "1," marked.)

The Court: Wasn't that a part of the Pleadings, Mr. Clasby? [42]

Mr. Clasby: Yes, we filed it as a part of the Pleadings. Perhaps it doesn't need to be introduced as an exhibit.

The Court: Well, I don't think it does.

Q. I will hand you this and ask you if you know what it is?

A. That is a map showing the boundary survey of the proposed addition to North Fairbanks, as we ran the survey in July, 1947.

Q. By whom was this map prepared?

A. The Alaska Architectural and Engineering Company.

Q. By yourself, under your supervision?

A. Yes.

Q. Does this map show the exterior boundary of the area proposed to be annexed, according to the survey made on the ground by yourself?

A. Yes, sir.

Q. Could you point out the place of beginning?

A. The place of beginning was Corner number 1 on the boundary survey, which is identical to the Corner number 7, survey 806, U. S. Survey 806 Amended.

Q. Is that a monument that is in existence?

(Testimony of John Frank Potter.)

A. No, Corner number 7 is not a monument that is in existence. That was re-established.

Q. You re-established it and began your survey from there? A. Yes, sir.

Q. All right, and then what course and distance did you run [43] on your first leg?

A. The line between Corner number 1 and 2, South 70 degrees and 17 minutes East, 418.9 feet.

Q. And then you established that point on the ground? A. Yes, sir.

Q. And then what was the next course and distance that you marked out on the ground?

A. Corner number 3.

Q. What was the course and distance to that point? A. South 78° 39' East, 300 feet.

Q. And then from that point did you go to another point set out on the ground, called Corner number 4?

A. Well, these points were not established points; previously established points.

Q. I understand. You didn't actually leave a permanent post there, but you made a turning point, didn't you? A. Yes.

Q. And you moved your instrument to these various points each time to converse your course and distance? A. Yes.

Q. Then you projected to a course and distance at point number four?

A. That is right. South 48° 31', East, 258.0 feet.

Q. And then you projected a course and dis-

(Testimony of John Frank Potter.)

tance to point number five. And what was that course and distance? [44]

A. That was South 26 degrees 18 minutes East, 286 feet.

Q. And then you projected a course and distance to point number 6. Would you give us that course and distance?

A. South 40 degrees 59 minutes East, 152.37 feet.

Q. And then you projected a course and distance to point number 7. What was that course and distance?

A. South 30 degrees 43 minutes East, 165 feet.

Q. And then you projected a course and distance to corner number 8. What was that course and distance?

A. South 12 degrees 51 minutes West, 50 feet.

Q. And then you projected a course and distance to point or Corner number 9. What was that course and distance?

A. South 34 degrees and 49 minutes West, 98.5 feet.

Q. And then you projected a course and distance to point number 10. What was that course and distance?

A. South 60 degrees 45 minutes West, 84 feet.

Q. And then you projected a course and distance to point number 11. What was that course and distance?

A. South 74 degrees 40 minutes West, 188 feet.

Q. And then the next course and distance you

(Testimony of John Frank Potter.)

projected was to point number 12. Will you give that course and distance, please?

A. North 47 degrees 28 minutes West, 32.2 feet.

Q. And then you projected a course and distance to point number 13. Would you give us that course and distance? [45]

A. North 83° 58' West, 147.4 feet.

Q. And you projected a course and distance to point number 14. Would you give us that course and distance?

A. North 88° 58' West, 100.0 feet.

Q. And then the next point to point number 15, would you give us that course and distance?

A. South 59° 56' West, 220.2 feet.

Q. And then the next course and distance to point number 16, would you give us that?

A. South 52° 40' West, 304.87 feet.

Q. And the next course and distance to point number 17, please?

A. South 30° 51' West, 228.1 feet.

Q. Is that the point at which the Noyes Slough joins the meander line of the Chena River?

A. That is right.

Q. And then where did you go?

A. Continued downstream along the North bank of the Chena River.

Q. And what was your course and distance, then, to point number 18?

A. South 79° 50' West, 305.18 feet.

(Testimony of John Frank Potter.)

Q. And what was your course and distance to point number 19?

A. South $68^{\circ} 51'$ West, 156.65 feet.

Q. What was your course and distance to point number 20?

A. South $47^{\circ} 34'$ West, 233.94 feet. [46]

Q. What was your course and distance to point number 21?

A. South $40^{\circ} 45'$ West, 258.25 feet.

Q. Is point 21 on the boundary of the present Fairbanks boundary?

A. That is point number 21 is on the boundary of the U. S. Survey Number 2159, which is the North Fairbanks Survey.

Q. North Fairbanks Townsite Survey?

A. Yes, sir.

Q. I see. All right. And what is your course and distance to point number 22?

A. North $47^{\circ} 53'$ West, 178.96 feet.

Q. And what is your course and distance to point number 23?

A. North $64^{\circ} 19'$ West, 35.73 feet.

Q. What is your course and distance to point number 24?

A. North $50^{\circ} 7'$ West, 214.14 feet.

Q. And what is your course and distance to point number 25?

A. North $55^{\circ} 35'$ West, 221.8 feet.

Q. What is your course and distance to point number 26?

(Testimony of John Frank Potter.)

A. North $64^{\circ} 53'$ West, 187.96 feet.

Q. What is your course and distance to point number 27?

A. North $74^{\circ} 24'$ West, 188.71 feet.

Q. What is your course and distance to point number 28?

A. South $83^{\circ} 55'$ West, 249.75 feet.

Q. Is point 28 identical with number 5, U. S. Survey 847? A. Yes, that is right. [47]

Q. And does U. S. Survey 847—is that a contract survey?

A. No, that is the Brandt survey.

Q. Brandt sub-division?

A. Brandt Homestead Survey.

Q. And then your next course and distance is to point 29?

A. South $47^{\circ} 21'$ East, 101.64 feet.

Q. And your next course and distance to point number 30?

A. South $10^{\circ} 44'$ East, 496.32 feet.

Q. And your next course and distance to point number 31?

A. South $10^{\circ} 30'$ East, 60.06 feet.

Q. And your next course and distance to point number 32?

A. South $17^{\circ} 06'$ West, 495.0 feet.

Q. Is that corner identical with Corner Number 4 of U. S. Survey 847? A. Yes, it is.

Q. And then would you give your course and

(Testimony of John Frank Potter.)

distance to point number 33?

A. North $49^{\circ} 45'$ West, 613.80 feet.

Q. And the course and distance to point number 34?

A. North $49^{\circ} 47'$ West, 140.02 feet.

Q. And your course and distance to point number 35?

A. North $32^{\circ} 23'$ West, 575.12 feet.

Q. Your course and distance to point number 36?

A. North $48^{\circ} 02'$ East, 596.35 feet.

Q. And your course and distance to point number 37? [48]

A. North $25^{\circ} 14'$ East, 2368.02 feet.

Q. And your course and distance to point number 38?

A. North $76^{\circ} 04'$ East, 524.6 feet.

Q. And your course and distance to point number 39?

A. South $24^{\circ} 51'$ East, 533.2 feet.

Q. And your course and distance to point number 40?

A. South $39^{\circ} 00'$ East, 198.0 feet.

Q. When you reached this point 40 with your instrument, what did you do?

A. Well, we ran the closing line to Corner number 1.

Q. You closed from that point of your instrument to the point at which you began your actual survey on the ground, and what was the course and distance?

A. South $44^{\circ} 30'$ East, 554.4 feet.

Q. Now, was your survey largely along the lines of surveys that had previously been made?

A. Well, there were numerous surveys that our survey tied into.

(Testimony of John Frank Potter.)

Q. Had you picked up points on Land Office—
U. S. Land Office Surveys as you went around?

A. Yes.

Q. And I notice that a great deal of your survey was along meander lines. What did you do, just go from point to point along the river bank at ordinary high water, or try to follow existing survey points?

A. Tried to follow existing survey points as far as we could.

Q. You had the field notes with you of existing survey points? A. That is right.

Q. And the area that you surveyed lies contiguous to the present boundaries of the Town of Fairbanks, does it not? A. Yes, sir.

Mr. Clasby: I think that is all.

Cross-Examination

By Mr. Hurley:

Q. Mr. Potter, I notice on this map by which you have just testified, that there are certain portions of the area that are marked off in blocks, and did you make that survey, or did you just put that in according to some other survey that had been previously made? A. You mean——

Q. (Interposed) This portion here (indicating), where it is marked "Slaterville."

A. That is right, that is just shown more or less for orientation of the map.

Q. You just put that in from other surveys and not from your own survey?

(Testimony of John Frank Potter.)

A. That is right.

Q. I see. Now, is that also true of North—this area marked “North Fairbanks Survey Number 2159”? [50]

A. Well, the boundary of that was established by this survey.

Q. Yes, but I mean the division?

A. Oh, yes, that is right.

Q. And is that same true with the Brandt Homestead Survey Number 847?

A. That is right.

Q. Did—do you know what the area is that is contained in this survey, approximately?

A. It was calculated. I don't have the notes with me right now.

Q. You don't know how much area there was?

A. No.

Q. Have you got that information?

A. Our notes were destroyed in the fire and I am not sure whether the city had a copy of those notes, or not.

Q. You don't know how much of this—— (interrupted).

The Court: I can't hear what he is saying. Did you catch that (to reporter)?

A. I am not sure if we had a copy of the notes. They were destroyed by fire, all our notes, unless the city had a copy.

Q. You don't know how much of this area has been set off in lots and blocks?

(Testimony of John Frank Potter.)

A. What area do you mean? [51]

Q. Of the area sought to be annexed, that is described here. You don't know how much of it was set off in lots and blocks?

A. What portion?

Q. Yes, or the number of acres?

A. No. No.

Q. I see. Now, do you know where the area that is described, is located, that belongs to the United States Smelting, Refining and Mining Company?

A. No, their property boundaries were not established, and they are not shown on the map.

Q. Well, don't you know where the main portions of their land is located?

A. You mean the portion of their land that is encompassed in this survey?

Q. Yes. A. Yes.

Q. Where is it?

A. That is included in this survey 806 in the Amended Survey 806.

Q. That is F. E. Company, or U. S. Smelting, Refining and Mining Company land?

A. Most of it. Most of it in this area.

Q. And how about this area here (indicating)?

A. No, that is Railroad property in there.

Q. That is Railroad property. Now, the area that you say—— [52] (interrupted).

The Court: What are you speaking of Mr. Hurley? You are saying "here."

Mr. Hurley: Well, I mean this area here that

(Testimony of John Frank Potter.)

he pointed to is marked "A.R.R. Terminal Reserve," I guess.

Q. Now, calling your attention to Survey number 806, you say that is—belongs to the U. S. Smelting, Refining and Mining Company? That (indicating)?

A. Portions of it; not all of it.

Q. Well, what—the main portions of it belongs to them, does it not?

A. That is right.

Q. And how about the—and this (indicating), marked "Steese Highway"—this road that runs along to the right of Survey Number 806, that is the main highway that goes out from Fairbanks, isn't it?

A. Yes, sir.

Q. Towards Circle?

A. Yes, sir.

Q. Does the United States Smelting, Refining and Mining Company own this block of ground on the right hand side of the road of the Steese Highway, as you go out?

A. Yes, sir.

Q. Are there some houses on a portion of that ground?

A. Yes, sir. [53]

Q. Are there any homes or cultivated land of any kind on this area known as U. S. Survey area 806?

A. You mean exclusive of the area?

Q. I mean this area here (indicating), that is on the west side of the Steese Highway?

A. No, sir.

Q. Referred to as Survey Number 806?

A. Not to my knowledge.

Q. And that is used by the United States Smelting, Refining and Mining Company for a power

(Testimony of John Frank Potter.)

house and garage and office building in connection with their operations, is it not? A. Yes, sir.

Q. And about what is the area of that portion of the property that is owned by the United States Smelting, Refining and Mining Company, approximately the area? Would you say about twenty acres? A. Possibly.

Mr. Hurley: I think that is all. Just a second (pause). That is all.

Mr. Clasby: That is all, Mr. Potter. If the Court please, we would like to have about five minutes recess. I have to get this a little closer in shape here.

The Court: All right, we will take a five minute recess.

(Whereupon, Court was recessed for five minutes.) [54]

Mr. Clasby: Call Clara Erickson.

CLARA M. ERICKSON

a witness called on behalf of the Petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Clasby:

Q. Would you state your name, please?

A. Clara M. Erickson.

Q. Are you a resident of Fairbanks?

A. Yes.

Q. How long have you lived in Fairbanks?

A. Three years last December.

(Testimony of Clara M. Erickson.)

Q. And are you employed? A. Yes.

Q. And what is your official capacity?

A. Assistant to the Land Registration Agent.

Q. And is that a Territorial Office that handles land registrations under the Act of Legislature known as Chapter 49 of the Session Laws of 1945?

A. Yes, it is.

Q. And where is your office?

A. In the District Land Office.

Q. Here in Fairbanks? A. Yes.

Q. And is there files in that office, registrations of title [55] to lands within the Fourth Division?

A. Yes.

Q. Are those records kept in your official custody? A. Yes, they are.

Q. Is there any other employee that has anything to do with those records?

A. Not in this Land Office.

Q. You are the sole employee? A. Yes.

Q. And have you examined the area sought to be annexed in this proceeding known as North Fairbanks? A. Yes, I have.

Q. And are you familiar with it, the boundaries of it? A. Yes.

Q. And do the registrations in your office cover the ownerships within that area?

A. They cover the ownerships who have declared.

Q. Who have declared their ownership in your office? A. Yes.

(Testimony of Clara M. Erickson.)

Q. Have you examined your records to determine how many persons have filed in your office as declarations of ownership covering property within the area sought to be annexed? A. Yes, I have.

Q. Have you counted those individual or separate ownerships? A. Yes. [56]

Q. And what is the total?

A. These individual ownerships, or counting husband and wife really filed on the declarations, there are 109.

Q. I mean, total in the area, whether they signed the petition or not.

A. I believe there are 216.

The Court: Two hundred what? A. 16.

Q. And I thought you had examined those records yesterday and today and found a little different figure than that, Mrs. Erickson?

Mr. Hurley: We object to that, if the Court please; incompetent, irrelevant and immaterial for the reason that as I understand the law there must be a majority of the owners with property interests signing the petition under the Code. It provides, I think, the ownership as far as that part of the proceeding is concerned, would depend upon the time that the petition was filed. It says "shall file in the District Court for the Judicial Division wherein the city is located, a petition signed by a majority of the owners of substantial property interests in land or possessory rights."

(Testimony of Clara M. Erickson.)

The Court: In other words, you——(interrupted)

Mr. Hurley: I think the number would be the number on the day the petition was filed.

Mr. Clasby: Well, I will withdraw that question. [57]

The Court: Very well.

Mr. Clasby: And I will proceed to another question and then come back.

Q. Have you examined the petition that has been filed in Court in this proceeding?

A. I have not had a chance, or been furnished the petition, itself.

Q. I mean, have you examined the names?

A. Yes, I have examined the names.

Q. And have you compared those names with your records?

A. Yes, I have.

Q. To determine whether or not any of those people had registered?

A. Yes.

Q. And have you determined the number that have registered?

A. Yes, I have the number that have registered—that have signed this petition.

Q. That have signed this petition. How many of these persons that have signed the petition were registered on November 8, 1948?

A. There were 107 registered, as of that date, and one transfer immediately afterwards.

Q. One transfer that was in the mail on that date?

(Testimony of Clara M. Erickson.)

A. I don't think it was in the mail.

Mr. Hurley: Then I move that part of the answer be [58] stricken out.

The Court: Which part?

Mr. Hurley: In which she says there was a transfer made after the 8th day of November, 1948. She said there was 107, as of that date, whose names appeared on the petition. Then she said there was one transferred.

The Court: Very well, that may be stricken.

Q. Now, have you examined your records in the Land Office to determine the number of persons registered, who did not sign the petition, as of November 8, 1948?

A. As of the notes I made on the day that I gave the deposition, there were 216 registered.

Q. That was a month later. Now, what I would like to know, Mrs. Erickson, how many persons on November 8, 1948, were registered, but did not sign the petition, if you have any notes to show that. Are these notations here in your handwriting?

A. Yes.

Q. When were those notations made?

A. Those were made December 8, I believe, as of the date the petition was filed.

Q. And how many persons, refreshing your memory from those notes, were there—(interrupted).

Mr. Hurley: I would like to have it a little more definite as to what notes she is referring to. [59]

(Testimony of Clara M. Erickson.)

The Court: Yes. Objection sustained.

Q. Well, did you make an actual count of those persons who had registered, but who had not signed the declaration on November 8, 1948?

A. According to my notes, there would be 103.

Q. Well, did you make an actual count?

A. Yes.

Q. Did you make notes of the actual count?

A. Yes. The notes are in pencil on the back of the list.

Q. Of 103? So the total of 107 and 103 is 210, is that correct?

A. Well, that is correct, but I think you should check back against the petition.

Q. Yes, but what I am driving at, Mrs. Erickson, I would like to know the most accurately you can give it, the total number of persons who are registered in the Land Office, irrespective of whether they signed the petition or not, and as I get it, from how many signed the petition and how many didn't sign the petition, the total is 210, is that correct?

A. That I am not sure, because I had no time this morning to make another check.

Q. But those are according to your notes at the time?

A. Those are according to the notes I have. I had no time to make a check.

Q. The best, to your testimony, is 210, is that right? [60]

(Testimony of Clara M. Erickson.)

Mr. Hurley: We object to that. She already testified it was 216.

The Court: Well, he can clear the matter up. Objection overruled.

Q. Is that right? A. Correct.

Mr. Clasby: That is all.

Cross-Examination

By Mr. Hurley:

Q. Would the Land Office records, if a man who had declared his ownership and had sold the property prior to the 8th day of November, 1948, there would be nothing in the Land Office to show that change unless the man that bought it came up there and filed another declaration?

A. No, there is nothing to show unless the new owner files.

Q. I see. And for instance, I think on the list, if you have checked it, you will find that a man by the name of Jack Taylor—he was 111. Have you got the list? He was 111 on the list. Jack Taylor and Frances Taylor, I think it was. It would be 198 and 111 on the list, if you have got one there of the petition, you will find they are numbered. I don't know whether—yes, they are numbered on the petition.

Mr. Clasby: What is your question, counsel?

Mr. Hurley: I just wanted to know if it didn't show in her office, in the Land Office, that they had filed a claim [61] for registration of title and that

(Testimony of Clara M. Erickson.)

it appeared there as of November 9, and it still showed there in their name as title—Frances Taylor and Jack Taylor?

A. I have the registration for Frances and Jack Taylor.

Q. And it showed that way on November 9—or, November 8, 1948?

A. Yes. There has been no turn over in title, according to my records.

Q. But if a deed was executed by them, transferring the property in August, 1948, and according to the Commissioner's Office, it wouldn't necessarily show in your office. You didn't check the Commissioner's Office to see if there had been any transfers?

A. No, I don't check the Commissioner's Office.

Q. I see. Now, you said in your direct examination that you—your figures showed 216 people had declared ownership in this proposed area that is—they seek—that is sought to be annexed. What did you take that from, from all the records of all the land in the area?

A. All the declarations that I hold in the office over that area.

Q. And that was 216 of them?

A. Yes, at that time.

Mr. Hurley: That is all.

Examination by the Court

Q. Just a moment. These people who registered,

(Testimony of Clara M. Erickson.)

now, did people [62] who had contracts to purchase, did they also register?

A. Yes, your Honor, some of them.

Q. And this number that you are giving were not necessarily people who claimed to own in fee simple? That would include people who had contracts to purchase, would it?

A. Yes, it did include some.

Q. And any mortgagees also register in that list?

A. Well, they register as contract of sale. That is all I have on my—— (interrupted).

Q. So that the 216 would include not only people who owned land, but those who had contracts to purchase, or mortgages on the land?

A. Yes, those that filed.

Q. And you don't—do you know how many people actually claimed to own the land and made declarations?

A. Would you clarify that a little?

Q. Did you make any distinction between a person who filed stating they owned the land, and a person who merely said they had a contract of sale?

A. On the records he just states a contract of sale as evidence of ownership, or if he owns it outright, he states a deed and where it is recorded.

Q. In other words, anybody with a contract of sale or a mortgage, would be called by you as an owner?

A. Yes, as far as I am concerned.

Q. And you don't know how many there were

(Testimony of Clara M. Erickson.)

who actually stated that they were owners, aside from those having contracts of sale?

A. They state—if he states that he is an owner, I take it for granted that he is.

Q. Did you require them to produce some evidence of their ownership?

A. No. The law states that they must swear before a notary or before two witnesses.

Q. And they don't have to show any deed or anything of that sort?

A. And the law doesn't ask them to show a deed.

Q. So at the present time, you don't know how many of those 216 stated they were owners and how many stated they had contracts of sale, do you?

A. I can check back in the records, if you will give me a minute, and see.

Q. I am just asking you right now if you know?

A. No, I can't say, off-hand, without looking.

The Court: That is all.

Mr. Clasby: Just a moment.

Redirect Examination

By Mr. Clasby:

Q. I notice that so far as the registration, the persons that have signed the registrations are concerned, that there are [64] seven who, at the time they signed the petition, held under contracts of sale. Of those seven, have you determined how many, before November 8, filed declarations showing their deed?

(Testimony of Clara M. Erickson.)

Mr. Hurley: I didn't—you say the petition that you filed says that there is that many claims?

Mr. Clasby: That is what the people said here.

Mr. Hurley: Oh, on the petition, they signed. I just didn't understand that.

A. I have a note there about the contracts of sale on that little piece of paper. The people who would not have owned their property by November 8 were Thomas D. and Ruthellen Heath, who were owners as of 11/15/48. Alden and Muriel Wilbur, who are still under sales contract, and Herschel Harter and Mrs. Pat Harter, owners as of 2/1/49.

Q. And in giving this total figure, you didn't count Thomas and Ruthellen Heath, as I understand it, because that is the declaration you received in the mail after November 8? A. Yes.

Q. So they are not counted?

A. They are not counted.

Q. So you have a registration for Alden Wilbur, is that correct? A. Yes.

Q. And he signed the petition? [65]

A. Yes, he did.

Q. And that registration showed that he held under a contract of sale? A. Yes.

Q. And I will see if I can find that. Does his registration show for himself and his wife?

A. It just shows Alden L. Wilbur.

Q. I see. So that is one of the 109 registered owners—this is according to your records—holding under a record of contract?

(Testimony of Clara M. Erickson.)

A. Mrs. Wilbur was not counted.

Q. But Alden was counted?

A. Alden was counted.

Q. All right, now, Herschel Harter and Mrs. Pat Harter. Their registration wasn't filed as of November 8, was it?

A. No, it was filed as of February 9, 1949.

Q. So you didn't count those two people in counting either your figure of 109, or your figure 210, being the total?

A. No, they were not counted.

Q. So then actually, there is only this one contract of sale that is taken account of by you in any of your computations? A. Yes.

Q. Except in this, that of the 103 persons who have registered, but did not sign the petition, you don't know how many of those may have had a contract of sale as the basis? [66]

A. No, I wouldn't know.

Q. You haven't checked that particular group for that particular purpose?

A. No, I haven't check those.

Mr. Clasby: That is all.

Further Examination by the Court

Q. Just a minute. For instance, there is Merry McAllister. Do you know whether that person made a declaration of title?

A. Yes, she did. It was recorded February, 1948.

Q. And is she down there? Do you have her down there as an owner?

(Testimony of Clara M. Erickson.)

A. Yes, she has given a deed as a title of evidence.

Mr. Clasby: Does she show a deed?

A. Yes, her title is checked as a deed.

The Court: It seems to me it is a title of purchase.

A. Excuse me, Judge, she has checked U. S. Patent, and she says it is recorded in the Fairbanks Recoding Precinct.

Mr. Clasby: My records only show she says "Escrow, Ken Murray's."

The Court: It seems on the petition, to be "contract of sale. Escrow is in Kenneth Murray." This is Merry McAllister. That is the one, is it?

A. Yes, and may I make a correction? She states the day acquired it, 8/16/48, and the filing as of August, 1948.

Mr. Clasby: And the petition shows the contract apparently [67] was May, '46.

Q. Now, how about Louis E. Johnson. Do you have him down there? Do you have it alphabetically, those who made the declarations?

A. No, I have them according to the petition.

Q. Louis E. Johnson?

A. And Nadine M. Johnson?

Q. Yes. A. They have not filed.

Q. And Mrs. A. H.—let's see, it would be—well, it is number 15. I can't read the initials. A. E. Lowman and Mrs. A. L. Lowman. Yes, A. R. Low-

(Testimony of Clara M. Erickson.)

man. Now this is number 15. The man. What do you have down for him?

A. He has filed his petition January 19, 1948, where he has filed his declaration, and he states the date he acquired it was 1/17/48.

Q. Does he claim to be an owner?

A. He doesn't state.

Q. He doesn't say he is an owner?

A. He doesn't state anything. He says he acquired it from Kathryn Lanier.

Q. And Mrs. A. R. Lowman, number 16?

A. She has filed with him. Agnes R. Lowman.

Q. That is the two together?

A. That is Mrs.

Q. And you recorded those as two owners, or one? [68]

A. They are two registered owners. One is owner and the other co-owner.

Q. And number 25. What do you have for him?

Mr. Clasby: Samuel C. Wilhaite.

A. He has not filed a declaration of ownership.

Q. Or his wife? Number 27, David V. McKeag?

A. David McKeag, Jr., and Mary McKeag filed as of June 29, 1946.

Q. And do they claim ownership or contract of sale? A. Claim ownership by a deed.

Mr. Clasby: I note that they claim their deed is at the Recorder's Office, or the title at the Recorder's Office, on the petition.

The Court: Yes. The trouble is that they put ditto marks down. The man above first had

(Testimony of Clara M. Erickson.)

“owner,” and then put contract of sale. I couldn’t tell whether the ditto referred to “contract of sale,” or “owner.”

Q. Now, for instance, number 32. Barbara Williams, is down here as a co-owner. Do you have her name to show—is there a statement to show how she became a co-owner?

A. I think probably she is the wife of the owner.

Q. Nothing to show why she claimed to be a co-owner.

A. No, the declaration is made out to Barbara G. Williams and James Arthur Williams.

Q. Who made the declaration? [69]

A. Barbara Williams has signed it.

Q. And did he sign it at all?

A. No. The one who makes the declaration signs it.

Q. And then you put down the two owners from that one declaration?

A. Yes, just as a co-owner.

Q. And is there any limitation as to—for instance, can anybody come in and say they and somebody else are owners and you record it that way?

A. Well, the Attorney General contends the ownership rests between the two claimants and not between us and the claimants.

Q. Well, anyway, just anybody comes in and—say, if they picked out five people and say, we five are the owners, you would put it down as five own-

(Testimony of Clara M. Erickson.)

ers the same as if the other four had made the affidavit?

A. Provided he swears to it before a Notary.

Q. And your records then, of the number who had declared, would include quite a number of people who didn't, themselves, make any declaration, wouldn't it?

A. Well, if four or five people owned the property, if they are co-owners, one person can put in a declaration for all, listing the co-owners.

Q. So your records are not—you are not testifying that 216 people actually swore that they were the owners, you are [70] just testifying that either they swore, or someone swore for them?

A. Yes.

Q. 104. Richard R. Jones. Contract of sale, it says on the petition. What does your record show?

A. Well, Richard R. Jones has not filed any declaration.

Q. 107. Herschel J. Harter?

A. Herschel J. Harter filed his declaration February 9, 1949, which was too late to be counted.

Q. You didn't count that?

A. No, it is not counted.

Q. Nor his wife's?

A. Or his wife's, either.

Q. 123. Harold W. Richardson?

A. Harold W. Richardson filed on August 19, 1948, but he had waited past the calendar year, so

(Testimony of Clara M. Erickson.)

he was delinquent, but that is the date of his filing.

Q. He is not included?

A. Yes, he is included, because we must accept them as of the date they come in, whether they are delinquent or not.

Mr. Clasby: Does his declaration show a contract or a deed?

A. It shows a deed, and it says, "recorded."

Q. And then his wife, the next one, apparently Alma M. Richardson? [71]

A. She is not on the declaration, so she is not counted.

Q. Mary Hansen, 132?

A. Was that Eva Hansen?

Q. 132 is Mary Hansen.

Mr. Clasby: It is on the next to the last page, third from the top.

A. Her declaration was recorded October 16, 1948, showing a deed, or patent as title of evidence.

Q. Then your list then, she is an owner, is she?

A. Yes.

Q. And Rudy Grassman, 133?

A. Rudy Grassman did not file a declaration.

Q. Or Catherine Grassman?

A. Or Catherine Grassman.

The Court: That is all.

Mr. Hurley: I would just like to—are you through, Mr. Clasby? Did you want to ask some questions?

Mr. Clasby: Just one more.

(Testimony of Clara M. Erickson.)

By Mr. Clasby:

Q. I wanted to get it clear. Your testimony is 210, or 216? I have used the figure "210," and the Court used the figure "216" as being the total number of persons registered who owned land in that area?

A. I would like to recheck it.

Mr. Clasby: All right. I will withdraw the question, [72] then, for the time being. You may go ahead, Mr. Hurley.

Recross-Examination

By Mr. Hurley:

Q. Calling your attention to—I think you have the petition there with the numbers in front of the names—number 12 is Louis E. Johnson and number 13 is Nadine M. Johnson, and I would like to know if there is anything in the Land Office in their names. Did they register anything in the Land Office?

A. Well, Mr. Hurley, do you mean anything in this?

Q. Any declaration in the Land Office of ownership in connection with the property they claim? Their names appear on the petition number 12 and 13.

A. No, there is nothing for the property here they claim as registered.

Q. Now, calling your attention to number 14, it says purchase contract. Now, this Ed Aldrich, number 14, was there anything in the Land Office in regard to land claimed by Ed Aldrich?

(Testimony of Clara M. Erickson.)

A. Not as of the date the petition was filed.

Q. Wasn't it claimed in the name of Patricia Aldrech?

A. No, not at that time—date.

Q. Dated 8th month, 17th day in '44?

A. She has a declaration now that is delinquent. It is not recorded because she hasn't paid the fine.

Q. But Ed Aldrech made no claim?

A. No.

Q. Now, coming down to number 20 and 21, Pat H. Willoughby and Gladys Willoughby, it says "owner," and is there anything registered under their name in the Land Office?

A. No, there isn't.

Q. Nothing registered under their name?

A. No.

Q. Now, how about 29 and 30, Francis G. and Vera N. Brown. Is there anything registered in their name in the Land Office?

A. No.

Q. Well, was there anything registered by Mr. Kilgore in regard to the property?

A. To that same property?

Q. Yes. A. No.

Q. He didn't register it in the Land Office?

A. No.

Q. Is there anything in the Land Office on number 40, Jonathan Vandermer?

A. No. He is not registered.

Q. How about Roger R. Rhodes and Emma Rhodes, who claim to be owners, F. A. 1638 I think

(Testimony of Clara M. Erickson.)

is the Land Office record. Does it show in the name of Roger R. Rhodes and Emma Rhodes, or does it show in the name of Charles Slater in the Land Office? [74] A. In the name of Charles Slater.

Q. In the name of Charles Slater. Now, we come down to number 53, R. A. Souders, and his number is F. A. 1631. Does that show in his name, or does it show in the name of Charles Slater in the Land Office? A. What number did you say he was?

Q. Number 53. Souders. Claims to be a co-owner, and it is 1631 in the Land Office registration. I say, does that register in his name or in the name of Charles Slater?

A. Mine are not numbered like yours, so I don't know just where he is.

Q. It is F. A. What does that F. A. stand for—1631.

A. I think "F. A." is the Fairbanks area.

Q. 1631 is the number as we have it here. The Land Office number. A. I can't find it.

Q. You haven't got his there?

Mr. Clasby: May I see the original petition?

A. It is not on my copy.

Mr. Clasby: We can't seem to find him on this copy anywhere.

Q. R. A. Sweeton, I guess it is. You couldn't read it, I guess. Number 53.

Mr. Clasby: Who does it follow? We couldn't read it [75] and couldn't count it, so our testimony doesn't take it into consideration.

(Testimony of Clara M. Erickson.)

Mr. Hurley: Well, it is on the list, anyway.

Mr. Clasby: If you can give us the name we will find out whether it is registered or not.

Mr. Hurley: After Heflinger there is a blank on mine.

Q. Well, that is registered under Charles Slater?

A. I would have to look in the files to see.

Q. Now, we come down to Nell H. Smith and V. Maurice Smith, and those are numbered 82 and 83. Are they registered in the Land Office in the name of Nell H. Smith and V. Maurice Smith, or under the name of Eleanor Ely?

A. In the name of Eleanor Ely.

Q. Now, we come down to 98—oh, that is Francis Taylor and Jack Taylor. I think that was registered in Jack Taylor's name, wasn't it?

A. No, there are two of them, Francis and Jack Taylor.

Q. I see. Well, that is the one I asked if you knew about a transfer in August, 1948. Now, number 117, Rachel A. Josephs, owner, Fairbanks. Was that—is that registered in the Land Office in her name?

A. No, it is registered in the name of P. V. Josephs—Pious Victor Josephs.

Q. Did Kay Jenkins make application to get it transferred or make a claim of ownership on that?

A. I don't have it.

Q. By reason of a deed from Pious Victor Josephs?

(Testimony of Clara M. Erickson.)

A. This is the only thing I have on it.

Q. You don't have any other record on that piece of ground? A. No, that is all.

Q. If there was a deed, it would be in the Commissioner's Office? But it is not in her name, Rachel

A. Josephs, in the Land Office?

A. No, it is just in his name.

Q. Just in his name. Now, calling attention to number 145, Ray Johnson, is there a record of that—is that recorded in Ray Johnson's name, or is it—I think it is F. A. 830—or is it in Roy Larson's name? A. That is in Roy Larson's name.

Q. Yes. Now, coming down to 150, Max O. Miller is listed as the owner and does the record in the Land Office—I think it is F. A. 84—does that show in the name of John Quinbo, or in the name of Max Miller?

A. There is nothing in the Land Office in the name of Max Miller.

Q. It shows in the name of John Quinbo?

A. It would have to be.

Mr. Hurley: I think that is all, your Honor.

Mr. Clasby: That is all for right now. Call Mr. Call. [77]

(Whereupon, Mrs. Clara M. Erickson was excused as a witness and left the witness stand.)

IRVING H. CALL

being called as a witness on behalf of the petitioner, was duly sworn and testified as follows:

Direct Examination

By Mr. Clasby:

Q. Would you state your name, please?

A. Irving H. Call.

Q. Are you a resident of Fairbanks, Mr. Call?

A. I am.

Q. How long have you lived in and about the Fairbanks area? A. Two and a half years.

Q. What is your present occupation?

A. City Manager for the Town of Fairbanks.

Q. How long have you held that office?

A. Since August 16, 1948.

Q. Are you familiar with the area proposed to be annexed to Fairbanks in this petition, known as North Fairbanks? A. I am.

Q. And does your office supervise the office of the City Engineer for the Town of Fairbanks?

A. It does.

Q. And in connection with the office of the City Engineer, do they fit in with the supervisory work for the Town of Fairbanks, [78] Alaska, for the Planning Commission? A. They do. Yes.

Q. Carry out plans for the Planning Commission?

Clerk of Court: Petitioner's Identification Number "1."

Q. I will hand you Petitioner's Identification

(Testimony of Irving H. Call.)

Number "1," and ask you to state what that is, if you know?

A. It is an area photograph of the area of Fairbanks. It was taken in May, 1948, by Reuel Griffin's Studios.

Q. And does that show the area proposed to be annexed by this petition? A. It does.

Q. So that it can get in the record will you, referring to this photograph, starting at a definite point, describe how the area sought to be annexed appears on the photograph?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial at this time.

The Court: Objection overruled.

Mr. Hurley: I would like to see it before any part of it goes into evidence.

The Court: Yes.

Clerk of Court: Petitioner's Identification Number "2."

Q. Now, would you proceed, Mr. Call, and describe, with reference to the photograph, where the boundary of the area proposed [79] to be annexed would lay on it?

Mr. Hurley: We object to it, incompetent, irrelevant and immaterial. Not the best evidence.

The Court: Probably I had better look at it, too.

Mr. Clasby: The best way to do it would be to mark on the photograph with pencil, but it is hard to make a mark that stands up clearly. If the

(Testimony of Irving H. Call.)

Court would prefer a mark, I will ask the witness to mark the photograph.

The Court: Could you draw an ink line on it? I am afraid a lead pencil wouldn't show.

Mr. Clasby: Could you draw an ink line on it, Mr. Call?

A. I believe I could. May I use the map exhibit?

The Court: Could you go ahead with something else and let him mark it during the noon hour?

Mr. Clasby: We could do that; yes.

Q. Would you describe for us, Mr. Call, the character—first, let me ask you this, are you familiar with the character of the area sought to be annexed? A. I am.

Q. You have been through it a number of times and observed it? A. I have.

Q. How long have you been familiar with the area? A. For about two years.

Q. And are you familiar with the development within the limits [80] of the Town of Fairbanks as it lies adjacent to the area sought to be annexed, or the Chena River, which separates Fairbanks limits from the area sought to be annexed?

A. I am.

Q. Are you familiar with an area known as Graehl Townsite? A. I am.

Q. And are you familiar with the areas beyond the area sought to be annexed, Bentley's Dairy, Creamer's Dairy, Lemeta Subdivision, Hamilton Acres, Derby Tract, and other areas?

(Testimony of Irving H. Call.)

A. I am.

Q. Now, would you describe for us, generally, the character of the area sought to be annexed, the kind of development that is in it and the extent?

A. I should say that it would be chiefly residential, with probably about ten or fifteen per cent industrial.

Q. And is some section of the area sought to be annexed, within sight of the Alaska Railroad Terminal Reserve?

A. Yes, sir.

Q. And you count those as one industrial user?

A. That was considered industrial, the per cent would probably be about thirty per cent.

Q. But you didn't consider that?

A. I didn't consider that.

Q. Now, could you tell us from the City Limit out on Cushman, or the Steese Highway, show us where the industrial users [81] are and name the industrial users?

A. The industrial users are, beginning on the Steese Highway just north of the present city limits, are the Healy River Coal Company, Fairbanks Lumber Supply Company, Union Oil Company, then there is a large sizeable piece of land that is set aside for the Alaska Road Commission, which, in itself, is not an industrial development. There is a large layout for the Petroleum Reserve, which is business and residential property at the present time, and the remainder of the property running

(Testimony of Irving H. Call.)

to the North is industrial and office space of the U. S. Mining and Smelting Company.

Q. Did you mention the Standard Oil Company?

A. I forgot the Standard Oil Company.

Q. To your knowledge, is there any vacant or unused land on the West side of the Steese Highway in this land industrial area?

A. There are sizeable tracts of land intermingled with this that can be used for considerable expansion of industrial areas. Particularly near the U. S. Smelting, Refining and Mining Company plant.

Q. That is, however, belonging to the U. S. Smelting? A. It is.

Q. In back of some of these developments, in back of the Alaska Railroad terminal there is still a little land that isn't used?

A. There is; yes. [82]

Q. But the frontage on the Steese Highway is all taken up? A. That is right.

Q. On the East—wait a minute, is there any industrial or business section in any other part of the area? Or is it all residential?

A. I would say it was all residential. The area which is now occupied as Slater Camp by the U. S. Army is a combination of residential and you might say, business. It is military purpose.

Q. That is, they have one military station there?

A. Established there.

Q. And on the photograph, does the Slater

(Testimony of Irving H. Call.)

Camp area show as 14 elongated buildings in the center foreground? A. Yes, sir.

Q. And there is streets down by them, and they are laid off, it looks like about two blocks of property? A. That is correct.

Q. That is the installation you refer to as the Army installation, is that correct?

A. That is right.

Q. And it absorbs nearly all the property laying between the lots and blocks called Slaterville, and the North to the Noyes Slough, is that correct?

A. That is correct.

Q. Now, directing your attention to the portion of this map [83] marked off in blocks, called Slaterville, which extends in its Northermost extremity from along the East side of the Army development, Noyes Slough, around in the junction of Noyes Slough and the Chena River and over Westerly, I guess, almost to the Steese Highway, goes to a last street called Boundary Street on the plat. Are you familiar with that? A. I am.

Q. Are those lots actually out there, marked off on the ground?

A. The blocks are marked off on the ground. I do not know how many of the lots inside the blocks are marked.

Q. Have you observed those blocks?

A. I have observed the blocks, yes.

Q. Have you noticed very many vacant lots?

A. There are numerous vacant lots and there

(Testimony of Irving H. Call.)

are numerous buildings completed, and there are numerous buildings under construction.

Q. And just giving your best estimate, what would you say would be the per cent that has been built up? A. Thirty per cent.

Q. This area is 30 per cent improved with houses? A. (Witness nodded.)

Q. And then between Boundary Street and the Steese Highway, there is a little section which I think is the North Fairbanks Townsite addition, about four or five blocks in there. Is that almost one hundred per cent improved with buildings [84] and dwellings?

A. Not a hundred per cent. There is a sizeable area there that has low lands that will—that is near the slough and is not suitable for residence, and is now used as a storage area for salvage material.

Q. I see. That is this little “L”—what looks like, on the map, a little “L” in block 6?

A. No, it would be adjacent to Slough Street, southerly of block 7.

Q. I see. Other than that, that is developed. Now, I direct your attention to the portion of this map marked “Homestead.” Has that homestead been broken up into lots and blocks?

A. Yes.

Q. As a matter of fact, there is very little if any of it still owned by Mrs. Brandt, isn’t that correct?

A. According to my information that is correct.

(Testimony of Irving H. Call.)

Q. And isn't it true that that is almost entirely developed?

A. The majority of the land above the high water mark, above the flood mark of the river is developed.

Q. There is one section where the old homestead was, about two acres, that is still a field right on the bank of the river, is that correct, that isn't developed, and then there is a building in there called a brewery, used for storage. That is to some extent commercial, and then in block 8, I guess it is a portion of block 9, there is the Alaska Freight Lines Main shops, isn't that correct?

A. That is correct.

Q. And those are the only two industrial users that you know of in that area, is that correct?

A. That is right.

Q. Now, on this map there is nothing shown on the East side of the Steese Highway from block 8 and 9, North addition to Fairbanks Townsite, North to Noyes Slough. However, to your knowledge, is that improved?

A. That is improved as a tract property.

Q. I see, the U. S. Smelting owns a block of houses, almost a block of houses directly North of block 8, do they not?

A. That is correct.

Q. And then, on out, right on the Slough, there is a substantial housing, is that not correct?

A. That is correct.

(Testimony of Irving H. Call.)

Q. And is there any Army quarters back in there that happens to be on their land?

A. I do not believe so. There is a well in that area that is on their land.

Q. That is a well where they get water, or could get water for their power house, is that correct?

A. That is correct.

Q. Now, directing your attention on out from this property, across Noyes Slough, is there any residential areas developed [86] out beyond there?

A. I would say directly—slightly Northeast from the Northerly portion of the United States Smelting and Mining Company is the development known as the Lemeta, across the Slough.

Q. And intervening, then, it and the U. S. Smelting, is merely the Noyes Slough and the Railroad right of way?

A. That is correct. There is a large bend in the river, which is not developed at the present time.

Q. How large a development is this Lemeta subdivision?

A. A very substantial homesite development with restricted lands—deeds restricted to frame dwellings.

Q. About three or four hundred lots in there?

A. I imagine about three or four hundred lots.

Q. And is it broken up into streets?

A. It is broken up into streets. The streets are graveled. There is electricity in the area and it is

(Testimony of Irving H. Call.)

at the present time being occupied very—to a large extent by people who are starting homes. Mainly people who have homes completed.

Q. I see, and that highway leads on out to a place known as College, Alaska, is that not correct?

A. That is correct.

Q. And about how far out is that?

A. College? About six miles.

Q. And is the area between College and Fairbanks gradually [87] building up with residences?

A. It is.

Q. And also just across the Slough from the area proposed to be annexed, lies the road that goes to Circle?

A. Yes, sir.

Q. And what is the character of the land along through which that road goes?

A. Well, leaving the bridge where the Steese Highway crosses the Noyes Slough, it proceeds in a Westerly direction, through Bentley's Dairy farm. Up until a year ago Bentley's Farm was strictly farming property, and it was in pasture, but has been converted to industrial use, a portion of it. It goes over about three-quarters of a mile from the bridge crossing of Noyes Slough where there is a junction that turns into Graehl, that portion to the North being known as the Derby Tract, and the Southerly area being the Graehl Section.

Q. Now, does the Graehl section, or part of it, show on this map, Petitioner's Identification Number 1?

(Testimony of Irving H. Call.)

A. Yes, it does, on the left hand side.

Q. The center on the left hand side?

A. That is right.

Q. And it follows Noyes Slough around and lays somewhat between the area South to be annexed and the Town of Fairbanks actually as it follows through, is that correct? [88] A. Umhummm.

Q. And now, this point three-quarters of a mile away where you speak of, is that where the Derby tract development starts? And that is just barely off the picture to the left, is that correct?

A. Yes.

Q. And is there a fairly substantial residential development there?

A. In the Derby Tract it is not very intensively developed. There are several homes and the lots that were laid out were large lots. The Graehl Section is highly developed.

The Court: Your proposed annexation doesn't take in Graehl, does it?

Mr. Clasby: No, this does not take in Graehl.

Q. Then, even beyond the Derby Tract, is a development known as the Hamilton Acres. Are you familiar with that? A. Yes, sir.

Q. And that lays adjacent to the Derby Tract and adjacent to the East boundary of the Graehl Townsite, isn't that correct?

A. I am not absolutely sure about the boundaries. I do know Hamilton Acres section which is now under development and has been developed

(Testimony of Irving H. Call.)

as residential property, does start at approximately the Northeast—yes, the North—Northeast corner of the Derby Tract. [89]

Q. And actually it extends down to the waterfront; just a bare corner of it is on the picture opposite an island in the middle of the picture on the extreme left, which island is known as Bentley's Island. At that point it joins the Graehl Townsite?

A. That is my general information. I have never seen an official photograph of the Hamilton Acres second division, you might say.

Q. Is there quite an area of the Hamilton Acres subdivision that has been subdivided and platted and lots sold?

A. The piece with which I am familiar lies Northerly of the railroad siding. I have never seen the property of that section lying Southerly of the railroad site. I know it exists, and there is a rough sketch in the office, indicating the total area, but I have never seen a plat or a layout.

Q. Are there about 125 lots in the area North of the highway?

A. I believe there is that many, yes.

Q. And that has all been sold to persons intending to build, or who have built; is that according to your information?

A. My information is that about sixty per cent of them are sold of the Hamilton Acres section North of the railroad site.*

(Testimony of Irving H. Call.)

Q. Now, on this photograph across the middle distance of the photograph, is a very congested area. Would you state what [90] that is, if you know?

A. Are you referring to the area adjacent to the river?

Q. Yes.

A. The land which lies above the meandering stream, which is known as the Chena River, is the Townsite of Fairbanks.

Q. I see, and I notice that the Chena River practically circles it, or does circle it on three sides?

A. That is correct.

Q. And is there a military reservation that lays to the East of the Town of Fairbanks, and South?

A. Lies to the Southeast of Fairbanks.

Q. And then what is it that is shown as a streak across the middle right of the picture?

A. The white streak is the area known as Weeks Field Airport field.

Q. And airfield runway?

A. Correct. Airfield runway.

Q. And that runs from the center of the picture over to the river?

A. Correct.

Q. In your opinion as City Manager, is it almost imperative that if the town continues its present growth it will grow completely into the area sought to be annexed and continue the growth on through that area, as demonstrated by the Lemeta Subdivision and these other subdivisions (interrupted).

Mr. Hurley: We object to that as incompetent,

(Testimony of Irving H. Call.)

irrelevant and immaterial. Calling for a conclusion. No proper foundation laid for its admission in evidence. Nothing to show that he ever made a survey or is qualified.

The Court: Objection overruled.

Mr. Clasby: Would you answer the question?

A. I would say that—would you please state it again?

Q. My question was, isn't it, is it your opinion that the town of Fairbanks, in continuing to grow, will completely fill the area proposed to be annexed, and carry on its present tendency, as demonstrated by the Lemeta and other subdivisions, and by growing on from the other areas proposed to be annexed, not West and Southwest?

Mr. Hurley: We object to it; incompetent, irrelevant and immaterial. Leading and suggestive. No proper foundation laid.

The Court: Objection overruled.

A. Oh, I believe it is very imperative all the sections adjacent to Fairbanks be annexed.

Q. I am asking you, in your opinion, is that the logical course of development?

A. That is the logical course of development.

Q. And in the past three years, has there been a considerable tendency towards that? [92]

Mr. Hurley: Object to that; incompetent, irrelevant and immaterial. Not the best evidence; calling for a conclusion.

The Court: Objection overruled.

(Testimony of Irving H. Call.)

A. It is.

Q. Do you know how old this Lemeta Development is?

A. About a year and a half.

Q. And do you know how old the Derby Development is?

A. To the best of my knowledge about 8 years.

Q. And do you know how old the Hamilton Acres Development is?

A. It is about a year and two months.

Q. Do you have any idea—withdraw the question. Is the area (interrupted).

The Court: Perhaps we had better take a recess at this time.

(Whereupon, at 12:00 o'clock noon, court was recessed until 2:00 o'clock p.m.)

Be It Remembered, that at 2:00 o'clock p.m., the trial of the above-entitled cause was continued, the above-named parties being present in court; the Honorable Harry E. Pratt, District Judge, presiding;

And Thereupon, the following proceedings were had:

The Court: Counsel ready to proceed?

Mr. Clasby: Ready to proceed.

Mr. Hurley: We are ready, your Honor. [93]

(Whereupon, Mr. Irving H. Call, the witness on the stand at the time of the noon re-

(Testimony of Irving H. Call.)

cess, resumed the stand for further direct examination.)

Q. Mr. Call, have you marked on Petitioner's Identification Number 1, an aerial photograph, the approximate boundaries of the area proposed to be annexed? A. It is. It is marked in ink.

Mr. Clasby: We ask that this be admitted as an exhibit.

Mr. Hurley: We object to it as incompetent, irrelevant and immaterial. No proper foundation laid. Not properly identified.

The Court: Objection sustained.

Q. Now, I will ask you if you recognize Identification Number "2"?

A. This is an aerial photograph of Fairbanks and the area surrounding Fairbanks.

Q. Do you know when it was taken?

A. It was taken May, 1948.

Q. Do you know by whom it was taken?

A. It was taken by Reuel Griffin's Studios.

Q. Do you know whether Reuel Griffin, or some employee, took it?

A. I do not know. I know he has the negative in his possession. [94]

Q. What does it purport to show?

A. It is an aerial picture showing the Fairbanks area.

Q. And does it show on it the area that is proposed to be annexed?

A. It shows the area proposed to be annexed,

(Testimony of Irving H. Call.)

as well as the area of the Fairbanks Townsite.

Q. And to which direction is one looking, looking into the picture?

A. Looking in a Southeasterly direction.

Q. And is that different from the direction looking into the picture in Petitioner's Identification Number "1"?

A. Petitioner's Identification Number "1" is looking in the area in a Southwesterly direction.

Mr. Clasby: We move the admission of Identification Number "2" at this time, also.

Mr. Hurley: We object to it; incompetent, irrelevant and immaterial. No proper foundation laid. Not properly identified.

The Court: It is the same as the other one. Not properly identified; nothing to show that it is a correct representation of the area as it appeared at that time—that the photograph was taken.

Mr. Clasby: I think I can get the photographer, so I will identify it further with him.

Q. Now, Mr. Call, do you know whether in this area proposed to [95] be annexed there are any schools?

A. There are no schools, to my knowledge.

Q. Are there any commercial outlets such as grocery stores, drug stores and things of a service nature?

A. None, to my knowledge.

Q. Is there any fire department operating in the area proposed to be annexed?

A. Not that I know of.

(Testimony of Irving H. Call.)

Q. Now, could you tell us what services the City of Fairbanks is ready to offer, or has to offer to the area to be annexed when it is taken within the City?

Mr. Hurley: I object to that as incompetent, irrelevant and immaterial. Calling for a conclusion. No proper foundation laid.

The Court: Objection overruled.

Mr. Hurley: Nothing to show the Council has ever taken any action to provide for the area that is proposed to be annexed.

A. The City of Fairbanks operates a Police Department, Fire Department, Public Works Department, as well as a general department of the city government which would be available for that area.

Q. Does that include Public Health Service?

A. Public Health Service.

Q. The City also operates a Public Library?

A. Operates a Public Library.

Q. Does it operate a street department, with graders and equipment for maintaining streets?

A. That is part of the Public Works Department. Complete survey and highway crews.

Q. I see, and isn't it true, also, that the Town of Fairbanks has, or generates utility—electric light, heat, a program for the development of water to be available for the proposed area?

Mr. Hurley: Same objection; incompetent, irrelevant and immaterial. No proper foundation

(Testimony of Irving H. Call.)

laid; calling for a conclusion; not the best evidence; nothing to show the City authorized to do it.

The Court: Objection overruled.

A. The City is in the process of developing a city program which will provide steam, water, electrical services to the City inhabitants and the outlying areas.

Q. This area proposed to be annexed has available to it at the present time electricity?

A. Yes.

Q. And the municipally owned service does extend its telephone?

A. The telephone system, under lease and operated by the municipality, extends telephone service to that area.

Q. And for many years past the City Fire Department, on call, has gone in there, has it not?

A. It has.

Q. And likewise, in case of emergency after the Marshal's Office is closed, the City Police, even though it is outside their jurisdiction, have gone in, have they not?

A. They have on emergency cases where it was burglaries have happened during the night time. They had made runs out there on no authority but as a general protection organization they have done that.

Q. Is there any other service community, and by service community I mean business section, affording people access to stores handling dry goods,

(Testimony of Irving H. Call.)

groceries, meat markets, beauty parlors, drug stores, etc., that is used by the area sought to be annexed, except Fairbanks?

A. Fairbanks is the only area. That is, the business area is the only area that maintains business houses for the general public. The only other location is South Fairbanks, which is just beginning to develop across the Town of Fairbanks, away from the area proposed to be developed.

Q. Do you know of the proposed installation of a school in the area sought to be annexed?

A. The City depends an awful lot on its parochial school to supplement the regular city system, and during last Fall and the early part of this year the city has set aside an area for the parochial school adjacent to the tower at Weeks Field. That area is not available until after the [98] airport stops. It is my knowledge that the Catholic Church or School has taken an option on land owned by Slater, or immediately in the Northerly part of the area to be annexed.

Q. And have they made extended efforts to find a location as close as possible to the center of town?

A. At one time they were interested in obtaining property on South Cushman around 16th Street, I should judge, and they have tried within the incorporated city of Fairbanks and in the north addition. I have been given to understand during our conferences with them, while they were considering location in the city limits, that they would prefer

(Testimony of Irving H. Call.)

being located in the Northerly section of Fairbanks.

Q. And is this location that they were finally able to get, out in the area represented by Plaintiff's Identification "1" of the series of Army buildings, or the buildings you testified to belong to the United States Government, Slater Camp?

A. It is in that area; yes, sir.

Q. And is that as close as they could get to the center of the area of population—— (interrupted).

Mr. Hurley: We object to that; calling for a conclusion; no proper foundation laid to show the witness qualified.

The Court: Objection sustained.

Mr. Hurley (Continuing): ——as to show what those people were qualified to do in purchasing land or building a school.

Mr. Clasby: I believe that is all. [99]

Cross-Examination

By Mr. Hurley:

Q. I believe you said that the area that is used for industrial purposes figured about thirty per cent of the total area proposed to be annexed?

A. That is right.

Q. Did you figure that up?

A. I figured it roughly from the map which was available, and I figured there was about, approximately fifty acres in the total of 150 acres in the area.

Q. And how much of that belongs to the United

(Testimony of Irving H. Call.)

States Smelting, Refining and Mining Company that is proposed to be included?

A. That would be about—well, I didn't look at the deeds or true maps which showed the boundary lines. One is an amended survey and another a survey. The latest one I have shows approximately seventeen acres.

Q. On that side of the road?

A. On the left hand side of the Steese Highway, as you go out.

Q. How much on the other side where those houses are?

A. It is about fourteen acres.

Q. About 14. And on this area on the left hand side of the road, there is a power house, is there not?

A. Yes, there is.

Q. And there is a couple of garages and an office building? [100] And they use this land solely for—in connection with their mining operations? There is no residences there?

A. There is no residences in that area.

Q. And it is used in connection with their mining operations, as far as you know?

A. It is used partly, I will say the majority of it is used for their mining operations. They do sell electricity to Fairbanks and the other area as a sub-contractor through the Northern Commercial Company.

Q. You mean they sub-contract?

A. They sell electrical energy to the Northern

(Testimony of Irving H. Call.)

Commercial Company, who redistributes it to the city.

Q. And they have their own water?

A. Their own water.

Q. And their own sewer?

A. Their own sewer.

Q. And their own electric lights?

A. Their own electric lights.

Q. And they sell it to the Town of Fairbanks through the N. C. Company?

A. That is correct.

Mr. Hurley: That is all.

Mr. Clasby: That is all.

(Whereupon, Mr. Irving H. Call was excused as a witness.) [101]

CLARA M. ERICKSON

having previously been duly sworn, was recalled as a witness on behalf of the Petitioners and testified as follows:

Direct Examination on Recall

By Mr. Clasby:

Q. You have been sworn this morning, Mrs. Erickson. During the recess have you examined the registrations in your office? A. Yes.

Q. To determine the exact number of persons who registered claiming title to properties in the area purported to be annexed?

A. Yes, I have examined the files.

Q. And have you run a total again on the total

(Testimony of Clara M. Erickson.)

number of persons in that area who have registered?

A. Yes, I have run a total, throwing out those that would have no bearing, and the registered owners, as of November 9, were 207.

The Court: How many?

A. Two hundred seven.

Q. And then have you again examined the petition on file here to check that? A. Yes.

Q. As against the registrations? [102]

A. I have checked the petition against the registered owners.

Q. And how many persons—how many names have you found on the petition that are registered owners within the area to be annexed?

A. The registered owners who have signed the petition are 106.

Q. One hundred and six? A. Yes.

Q. Of that 106, it includes Jack Wilbur, does it not? A. Yes.

Q. Alden Wilbur, rather?

A. Alden Wilbur.

Q. So there is one of those in the total of 106 that has registration showing a contract of sale?

A. Yes.

Mr. Clasby: I have no other questions.

Cross-Examination on Recall

By Mr. Hurley:

Q. Did that leave off all those that I asked you about this morning? A. Which?

(Testimony of Clara M. Erickson.)

Q. All these different ones that signed the petition and whose names did not appear up there in the Land Office?

A. Yes, that leaves off all those who haven't put in a [103] registration.

Q. Now, what did you mean by—you said there was 207. That included all that had any bearing on the case. What did you mean by that?

A. Mr. Heath, who transferred a little too late and was included, is taken out and I think it was owing to the fact I didn't understand exactly what was required that I had more names than should have been, so in checking back on the registrations the ones that were taken out that shouldn't have been there.

Q. How many were those that were taken out that you say shouldn't have been there?

A. Well, I don't know. I just didn't bring them. Only from the petition and from the list of property owners in that area.

Mr. Hurley: I see. That is all.

Examination by the Court:

Q. Now, this 207 includes everybody who said he was an owner and everybody who claimed that he had a contract of sale or mortgage, does it?

A. Yes, that put in a registration either starting a contract of sale, or owner.

The Court: That is all.

(Testimony of Clara M. Erickson.)

Redirect Examination on Recall

By Mr. Clasby: [104]

Q. The only one who is registered claiming to hold under a contract of sale is Alden Wilbur, is that correct?

A. That is.

Q. That is, whose registration shows he is claiming under a contract of sale?

A. That he is claiming under a contract of sale.

The Court: How about mortgage? Do you have any under that in that 207, holding under a mortgage?

A. They made no statement whether it is a mortgage or not.

Q. You have no declaration filed as to whether they had a mortgage on the piece of land?

A. No, I have no declaration filed claiming a mortgage on any piece of land.

Mr. Clasby: That is all. Will you step down, please?

(Whereupon, Mrs. Clara M. Erickson was excused as a witness and left the witness stand.)

Mr. Clasby: If the Court please, I would prefer to further identify these photographs with Mr. Griffin, who isn't here just yet, and at this time, other than that, I am ready to rest, and I am willing to rest now, with the privilege, if counsel will grant it, of putting Mr. Griffin on for further identifying the photographs. Oh, here he is now. Excuse me a moment. (Pause, while Mr. Clasby talked to Mr. Griffin.)

REUEL GRIFFIN

being called as a witness on behalf of the petitioner, was duly sworn and testified [105] as follows:

Direct Examination

By Mr. Clasby:

Q. Would you state your name, please?

A. Reuel Griffin.

Q. Are you a resident of Fairbanks, Mr. Griffin.

A. Yes, sir.

Q. How long have you lived in or about Fairbanks? A. About five years.

Q. And are you familiar with Fairbanks and the areas around Fairbanks? A. Yes, sir.

Q. Have you had occasion to observe them several times from the air? A. Yes, sir.

Q. Now, I will hand you Plaintiff's Identification Number "1" and "2," and ask you if you know what those are?

A. These are pictures that I took about a year ago, at the time of the flood. I believe it was the latter part of May.

Q. 1948? A. Yes, sir.

Q. And what are the pictures of? What do they represent?

A. Well, they are both of the City of Fairbanks and surrounding area, showing the Chena River running through [106] town.

Q. Are they taken from the air?

A. Yes, sir.

Q. Taken by you, personally?

(Testimony of Reuel Griffin.)

A. Yes, sir.

Q. Do they truly represent the Town of Fairbanks and the surrounding area as it existed in May of 1948?

A. Yes, sir.

Q. I notice that Exhibit Number—Identification Number “1,” looking into the picture, you are looking almost South, and in the far distance of the picture is the Tanana River, is that correct?

A. That is right.

Q. And in the immediate foreground is Noyes Slough?

A. Yes.

Q. Identification Number “2,” in the immediate foreground is the Railroad Reserve and it is looking East, or in an Easterly direction, is that correct?

A. Yes, that is a Southeasterly direction.

Q. And the middle and distance of the photograph on the left is the Army Air Base, is that correct?

A. Yes, sir.

Q. And both those photographs truly represent Fairbanks and the surrounding area as of May, 1948?

A. Yes, sir. [107]

Mr. Clasby: We ask they be admitted.

Mr. Hurley: Same objection.

The Court: Objection overruled. They may be admitted.

Clerk of Court: Identification Number “1” is Petitioner’s Exhibit “A,” and Number “2,” is “B.”

(Petitioner’s Identification “1” admitted in evidence as Petitioner’s Exhibit “A.”)

(Testimony of Reuel Griffin.)

(Petitioner's Identification "2" admitted in evidence as Petitioner's Exhibit "B.")

(Whereupon, Mr. Reuel Griffin was excused as a witness and left the witness stand.)

Mr. Clasby: We rest.

Mr. Hurley: We move at this time, on behalf of the Protestants United States Smelting, Refining and Mining Company and Charles Slater—I desire to move for a non-suit and ask that the Petition be dismissed for the reason that the petition alleges that there are 282 owners of substantial property interests in land or possessory rights in land or improvements upon land in the Territory above described, and sought by this petition to be annexed to the Town of Fairbanks, Alaska. We admit that and allege that there are more than 310 owners.

Now, the statute says that a petition must be filed with a majority of the owners of substantial property interests in land or possession in land or improvements upon land within the proposed territory. Now, they have proven that there were [108] 106 people who signed this petition who claimed to have a substantial property interest in land within the area, but according to their own allegations which we admit, of 282, although we do say there is more than 310, there would have to be 142 signers on the petition who were qualified signers as owners of property—substantial property rights or interest in land proposed to be annexed.

Now, they made no attempt to show that they have the required number. The petition, itself, shows that there are 149 signers, and only 106 of these have been shown to have any interest of any kind in property interest in the land proposed to be annexed. Now, on cross-examination I have shown that there are at least 28 who do not have anything recorded in the Land Office to show that they claim any substantial right in land, that they are either owners, lessees or are claiming or holding under lease or contract of sale, so they have entirely failed to prove a majority which they allege. When they allege the number and which they say have signed the petition, they have made no attempt to show that there is a majority of the 282 owners of substantial property interest whom they say have a right to sign the petition in the proposed area. Now, there is nothing that I know of in the law that says under a section like we have here that all they have to do is to file a petition and say that they have got 53 per cent of the people qualified to sign it.

It says in the law "a petition signed by a majority of the owners of substantial property interests in land or possessory rights in lands, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, and stating the number of inhabitants therein, as well as the number of owners of property therein situate. And they shall file such a petition in the District Court." Well, now, they allege that, and they allege the number who have the right to sign and they allege that 53 per cent have signed.

Now, the burden of proof is certainly on them to show at least by some kind of evidence that these people that signed the petition were qualified, but they come in and show that 106 signed that they claimed were qualified to sign, but their petition shows that they had to have 142, according to their own allegations, and at least 155, according to our allegations—our Affirmative Defense, so it seems to me there has been a total failure of proof. I think a non-suit should be granted.

Mr. Clasby: May it please the Court, while it is true that the petition alleges there are 282 owners of substantial property interests in the area sought to be annexed, that was a matter we must prove, and we brought in the best evidence we could to prove our allegations. Our allegation was in error, and we proved the number of owners of substantial property interests within the area proposed to be annexed, and proved it to be 207. It went in without objection from any source, insofar [110] as constituting an amendment to the petition; as far as that is concerned, it would constitute an amendment to the Petition. Now, we are relying upon the registrations as showing what the 100 per cent is, and that figure, according to the testimony, is 207. Now, the Code says: "Those owners of land within the limits of the territory sought to be annexed, who have filed a statement of their ownership in the United States General Land Office in the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945,

shall be presumed to be the owners of substantial property interests in land or possessory rights of land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary."

Therefore, according to that section of the Code, the total number of the persons having property within the area, who have registered them, are those owners of substantial interests in property which are to be considered in testing whether or not this petition is sufficient. That number, as I have said, is 207, and we have shown by affirmative testimony that the petition is supported by 106 of those persons, and it is obvious that that is a majority of those persons who are, according to this section, the persons owning substantial interest in property within the area sought to be annexed. They are presumed to be the ones, and the statute does leave it up to the [111] defense on a clear showing that there are others; to have others counted, but until that is done, why it doesn't seem to be a burden of proof upon the City, or upon the proponents of this annexation. This statute gives the description of what shall be called the one hundred per cent.

Mr. Hurley: If the Court please, all that part of the statute does is to go ahead and say that when they have registered in the Land Office, it shall be *prima facie* evidence of ownership, but it is not conclusive. That, in itself, is not conclusive, and

they cannot come in after they allege 282 qualified and we admit that and allege that there are 310, they can't come in and say because they come in and show that by prima facie evidence there is 107, and say we have consented to that being the number. We never consented to anything. We admit—they allege it and we admit it, and they are bound by the allegations of their Complaint, and they never asked to amend. They never even asked to amend their Complaint to change the claim it was necessary for them to have 142, and they come in with their petition with some 148 names on it, and now they say that these people they had sign this petition had no right to sign. I can't understand their theory, your Honor. I admit a lot of them didn't have, but I don't admit there wasn't at least 103 or 104 of them, or even more than that; according to our figures they had to have 155 signers to have a valid petition. People that we have checked on, and know have valid [112] property interests in land and they are entitled to vote, or were entitled to sign the petition.

The Court: Well, their allegations were 282 owners of substantial property interests. Why, naturally, it is up to them to prove that. The fact that they showed there were 207 who registered, shows that there were that many that registered, but it doesn't show that there are others who owned interest in the area and who have failed to register, so the motion is well taken and will be granted. The petition is dismissed. [113]

United States of America,
Territory of Alaska—ss.

I, Margaret M. Wilkins, of Fairbanks, Alaska,
hereby certify:

That I am the Official Court Reporter in the District Court for the Territory of Alaska, Fourth Division; that I attended the trial of the cause entitled "In the Matter of the Annexation of Certain Lands Known as Slaterville, Garden Island, and North Fairbanks. To: The Town of Fairbanks, Alaska, a municipal corporation," Number 6032, at Fairbanks, Alaska, on May 23, 1949, and took down in Stenotype the testimony given and proceedings had thereat; that I thereafter transcribed said Stenotype notes, and the foregoing pages, numbered 1 to 75, both inclusive, comprise a full, true and correct statement and transcript of such testimony and proceedings, to the best of my ability.

Dated at Fairbanks, Alaska, this 18th day of July, 1949.

/s/ (MRS.) MARGARET M.

WILKINS,

Official Court Reporter.

[Endorsed]: Filed July 18, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 135 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 6032, entitled In the Matter of the Annexation of Certain Lands known as Slaterville, Garden Island and North Fairbanks, To: The Town of Fairbanks, Alaska, a municipal corporation, and was made pursuant to and in accordance with the Praeceptum of the Petitioner and Appellant, filed in this action, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof, consisting of page "a," is a correct Index of said Transcript of Record, and that the list of attorneys, as shown on page "b," is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to \$13.90 has been paid to me by counsel for Petitioner and Appellant in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 30th day of August, 1949.

[Seal] /s/ JOHN B. HALL,

Clerk, District Court, Territory of Alaska, 4th Divn.

[Endorsed]: No. 12348, United States Court of Appeals for the Ninth Circuit. Town of Fairbanks, Alaska, a municipal corporation, Appellant, vs. United States Smelting, Refining and Mining Company, Inc., and Charles Slater, Appellees. Transcript of Record. Appeal from the U. S. District Court for the Territory of Alaska, Fourth Division.

Filed September 9, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals

for the Ninth Circuit

No. 12348

In the Matter of

The Annexation of Certain Lands known as "Slaterville," "Garden Island" and "North Fairbanks."

To: The Town of Fairbanks, Alaska, a Municipal Corporation.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON AND DESIGNATION OF
PARTS OF RECORD TO BE PRINTED

Comes Now, appellant and states that for the purpose of this appeal it intends to rely upon the points set out in appellant's assignments of error; and appellant designates as necessary for considera-

tion of this appeal the entire record transmitted to the Clerk of this Court pursuant to appellant's Praecipe.

Dated this 28th day of October, 1949.

/s/ CHAS. J. CLASBY,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 31, 1949.

No. 12,348

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,

Appellees.

BRIEF FOR APPELLANT.

COLLINS & CLASBY,

CHAS J. CLASBY,

540 Second Avenue, Fairbanks, Alaska,

Attorney for Appellant.

FILED

FEB 20 1950

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Jurisdictional statement	2
Statement of issues	2
The legislative acts	2
The pleadings	5
The evidence	6
Specification of error	7
Argument	7

I.

The annexation statutes create a valid presumption that those persons in the affected area who have registered their titles are all that are entitled to be considered interested; and that the burden is upon appellees to make a clear showing to the contrary	9
--	---

II.

A variance in the proof from a statement of fact in an annexation petition that is not in itself a material issue is not fatal, and forms no foundation for nonsuit.....	20
--	----

III.

The variance between the pleadings and the proof is such as is directed by the statutes to be disregarded by the courts in arriving at a decision on the material issue.....	23
--	----

Table of Authorities Cited

Cases	Pages
Armstrong v. Nu-Enamel Corp., 305 U.S. 321.....	14
Balanbanoff v. Kellogg (1940), 10 Alaska Reports 11, 118 F. (2d) 597	23
Bandini Co. v. Superior Court (1931), U.S. 8.....	11
Black v. Teeter (1902), 1 Alaska 564	28
Campbell v. Laclede Gas Company (1886), 119 U.S. 446....	12, 14
Femmer v. City of Juneau, 9 Alaska 315, 97 F. (2d) 649....	11
In re Town of Sitka (1946), 11 A. 201	18
Jacques v. Fourthman (Penn. 1890), 20 Atl. 802.....	27
Leaman v. Thompson (Wn. 1906), 86 P. 926.....	29
Ringstad v. Grannis (1947), 159 F. (2d) 289, 11 Alaska 269	22, 30
U. S. v. American Trucking Ass'ns. (1940), 310 U.S. 534..	14
U. S. v. Cooper, 312 U.S. 600.....	16
U. S. v. Dasher (1940), 9 Alaska 719	17
U. S. v. Hardecastle (1942), 10 Alaska 254	17, 19
U. S. v. Rosenblum Truck Lines, 315 U.S. 53.....	10
U. S. v. Stone & Downer Co. (1927), 274 U.S. 225.....	14
U. S. v. Stromberger, 9 Alaska 689	11
Wis. C. R'd. Co. v. Forsythe, 159 U.S. 55.....	14

Other Authorities

A.C.L.A. 16-1-21 to 16-1-28	1
A.C.L.A. 16-1-22	2, 4, 10
A.C.L.A. 53-1-1	2
A.C.L.A. 55-5-71.....	23, 24
A.C.L.A. 55-5-72	23, 24
A.C.L.A. 55-5-73	23, 27

TABLE OF AUTHORITIES CITED

iii

	Pages
A.C.L.A. 55-5-76	23
A.C.L.A. 55-5-81	23, 24, 28
59 C. J., Section 645, pp. 1094, 1095	16
Laws of Alaska, 1945, Chapter 49	4, 6, 10, 11
Laws of Alaska, 1947, Chapter 50	2, 4, 10
Rev. Stat. Section 891, page 448	13
28 U.S.C. 1291, 1294	2

No. 12,348

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,

Appellees.

BRIEF FOR APPELLANT.

The Town of Fairbanks, a municipal corporation, filed in the District Court for the Territory of Alaska, Fourth Division, its petition for the annexation of certain lands contiguous to its north boundary. The United States Smelting, Refining and Mining Company, a Maine Corporation, and Charles Slater, owners of property within the area affected by the proposed annexation appearing in the proceeding, in due course filed answers as protestants, and the cause was set for trial. The petition was filed under the authority of A.C.L.A. 16-1-21 to 16-1-28. Petitioner made a *prima facie* case under authority of Chapter 50, Laws

of Alaska 1947, codified as the last paragraph of A.C.L.A. 16-1-22, and rested, whereupon on motion of protestants for nonsuit, the petition was dismissed by the Court.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a court of general jurisdiction (A.C.L.A. 53-1-1) in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court of Alaska. (28 U.S.C. 1291, 1294.)

STATEMENT OF ISSUES.

The Legislative Acts.

The legislative acts governing this proceeding, so far as pertinent to the issues herein, are codified in A.C.L.A. as the following sections:

“16-1-21. ANNEXATION OR EXCLUSION OF TERRITORY AUTHORIZED. Any Territory not heretofore incorporated as a city but lying contiguous to any such corporation may be annexed thereto in the manner hereinafter provided, and when so annexed shall become a part of such city and be subject to all its laws and ordinances; provided that whenever such unincorporated territory is separated from any city by water or by tide or shore

(NOTE): Appellant was petitioner below; appellees protestants. All emphasis in this brief is ours unless otherwise indicated.

lands, said unincorporated territory shall be deemed contiguous for all the purposes of this Act; and any territory within the corporate limits of any municipal corporation may be excluded therefrom in the manner hereinafter provided."

"16-1-22. PETITION, HEARING AND ORDER FOR ELECTION: PERSONS PRESUMED OWNERS OF PROPERTY.

Whenever the *council of any city shall desire* to enlarge the limits of said city by annexing the territory contiguous thereto, *they shall file* in the district court for the judicial division wherein the city is located, a *petition signed by a majority of the owners* of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, setting forth by metes and bounds the territory sought to be annexed to such city, *and there shall be attached thereto* a plat based upon an actual survey by a competent surveyor *setting forth* the limits and boundaries of the territory to be annexed by metes and bounds *and stating* the number of inhabitants therein, *as well as* the number of owners of property therein situate and such other facts as the court may require. Said petition shall be sworn to on behalf of the city and by at least one of the property owners herein provided for. Said petition may be presented in open court or to the judge of said court in chambers and said judge shall fix a time and place of hearing on the petition and shall cause notice of said hearing to be posted in at least three of the most public places in such city and in three places within the territory sought to be annexed, and if a newspaper be published in said city, then to

publish such notice at least three times in such paper. Such notices shall be posted at least four weeks before the hearing and the first publication of such notice in the newspaper shall be at least four weeks before the hearing. *The court shall make diligent inquiry as to the reasonableness and justice of the petition, and if the court be satisfied from proofs and evidence that no private rights will be injured by granting the petition and if it is just and reasonable that the annexation take place, the court shall, unless it be shown that the petition is not bona fide or that one or more of the signers thereto are not owners of substantial property rights as herein provided or fails to comply with the requirements of this act in any other respect, order an election.*

“Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945, (Sections 22-2-1—22-2-18 herein), shall be presumed to be the owners of substantial property interests in land or possessory rights in lands, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary.”

The last paragraph (italicized above) of Section 16-1-22 was adopted by the legislature in 1947 (Chapter 50 L. Alaska, 1947); and Chapter 49 of the Laws of Alaska, 1945, insofar as the same refers to registration, is set forth as Appendix I to this brief.

The Pleadings.

The petition (Tr. 2-19) and the determination of the Common Council (Tr. 20-21) follow the language of the act in its specification of the *contents* of such a petition, identifying the town, describing the area to be annexed by metes and bounds, alleging the number of inhabitants of the area, that the petition is supported by a majority owners, a statement of the reasons for annexation, and the following statement—at issue on this appeal.

“IV.

“There are 282 owners of substantial property interests in land or possession in land or improvements upon land in the Territory above described and sought by this petition to be annexed to the Town of Fairbanks, Alaska.”

All of the allegations of the petition, excepting a description of petitioner, and specifically including said paragraph IV are *directly denied* by protestant United States Smelting, Refining and Mining Company, Inc. (Tr. 25) and Charles Slater (Tr. 31). The *protestant Charles Slater* by way of affirmative allegation, in addition to his denials, alleges:

“V.

Protestant alleges that there are more than three hundred and ten (310) owners of substantial property interests in land or possessory rights in land, tideland or improvements upon land or tideland within the limits of the territory described in said Petition and proposed to be annexed to the Town of Fairbanks, Alaska.”

In replying to the answer of Charles Slater the foregoing allegation is denied by petitioner. (Tr. 36.)

The Evidence.

The trial was brief, and all the evidence is in the record. (Tr. 63-133.) In addition to adequate proof of the reasonableness and justice of the petition, that no private rights would be injured by granting the petition, and that it is just and reasonable that annexation take place, about which there is no controversy on the appeal, appellant established by its evidence:

A. That the *number of owners of property therein situate* on the date of the filing of the petition was in fact 206 (Tr. 122-125, excluding Alden Wilber holding under contract), *under the presumption* contained in the statute, that being those owners within the area sought to be annexed who registered in the General Land Office under Chapter 49, Session Laws of Alaska, 1945.

B. That the petition is supported by the signatures of 106 (Tr. 81) persons presumed to be owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon lands or tideland within the area proposed to be annexed, as defined by the statute. (Tr. 81-84, 122-123.)

SPECIFICATION OF ERROR.

Appellant will rely for this appeal upon the following error:

1. That the District Court erred in granting appellees' motion for a nonsuit and in ordering the petition dismissed. (Assignments of Error, Tr. 48-53.)

ARGUMENT.

The statute for annexation requires that the Council

“* * * file in the district court * * * a petition signed by a majority of owners * * * and there shall be attached thereto a plat * * * setting forth * * * and stating the number of inhabitants therein, as well as the number of property owners therein * * * the court shall, unless it be shown that the petition * * * fails to comply with the provisions of this act in any other respect, order an election * * *

“These owners * * * who have filed a statement * * * *shall be presumed to be owners* * * *

The petition, verified on information and belief, does allege that there were 282 owners within the area. The pleadings deny this to be true, excepting *one protestant* affirmatively alleges it to be a greater figure. The proof was that 207 persons had “filed a statement * * *”.

Appellees, in their motion for nonsuit, took the position that, as we had alleged 282, and one appellee had affirmatively alleged there were 310 (Tr. 130), they *had thus admitted* that there were at least 282

owners in the area, that we were thus bound by the pleading, and had not established, by our proof of support by 106 registered owners, that the petition was supported by a majority. (Tr. 128-130, 131-132.)

We took the position that statute controlled the presumptive number of owners, that the pleading was a mistake to that extent and amended to conform to the proof, and that the number was a matter in issue for the sole purpose of testing if the petition was supported by a majority. (Tr. 130-131.)

The Court said:

“* * * Well, their allegations were 282 owners of substantial property interests. Why, naturally, it is up to them to prove that. The fact that they showed there were 207 who registered, shows that there were that many that registered, but it doesn't show that there are others who owned interest in the area and who have failed to register, so the motion is well taken and will be granted. The petition is dismissed.”

The argument of appellant demonstrating the error of the Court falls logically into development of the following three propositions:

A. The annexation statutes create a valid presumption that persons in the affected area who have registered their titles are all that are entitled to be considered interested; and that the burden is upon appellees to make a clear showing to the contrary.

B. A variance in proof from a statement of fact as to number of owners is an annexation pe-

tion that is not in itself a material issue forms no foundation for nonsuit.

C. The variance between the pleadings and the proof is such as is directed by the statutes to be disregarded by the Court in arriving at a decision on the material issue.

I.

THE ANNEXATION STATUTES CREATE A VALID PRESUMPTION THAT THOSE PERSONS IN THE AFFECTED AREA WHO HAVE REGISTERED THEIR TITLES ARE ALL THAT ARE ENTITLED TO BE CONSIDERED INTERESTED; AND THAT THE BURDEN IS UPON APPELLEES TO MAKE A CLEAR SHOWING TO THE CONTRARY.

The petition must be supported by the signatures of "a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or in improvements on lands or tidelands within the limits of the Territory so proposed to be annexed * * *". This classification, without further definition, existed prior to 1947.

Obviously to determine the number that is a majority of a class one must count the class. How, then, is one to measure a "substantial" interest? What is a "possessory" interest that is "substantial", etc.

Prior to 1945 there was not in Alaska any real property roll outside incorporated municipalities. There was no system of territorial realty taxation. There was no record to which the Court could be referred for an official, exact or even presumptive

“count” of the class. The statute then posed a grave issue of fact and legal definition in determining the number constituting the class.

In the 1945 session of the legislature the first roll of real property owners in Alaska was proposed. (Chapter 49, Session Laws, 1945.) This act required a registration; and became effective on the General Land Office setting up machinery therefor.

By 1947, the next session of the legislature, there was in existence a roll of owners of real property located outside incorporated municipalities. The legislature, presuming compliance with its registration act, then had available a record source of information as to “property owners” that could be used in an annexation case. They then passed the act (L. 1947, Chapter 50), effective March 20, 1947, that became the last paragraph of A.C.L.A. 16-1-22:

“Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 (Sections 22-2-1—22-2-18 herein), shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary.”

As Justice Murphy said in *U. S. v. Rosenblum Truck Lines*, 315 U.S. 53:

“The question here, as in any problem of statutory constructions, is the intention of the enacting body.”

See also:

Femmer v. City of Juneau, 9 Alaska 315, 97 F. (2d) 649;

U. S. v. Stromberger, 9 Alaska 689.

The logical interpretation of the amendment is that it changed the act to require the filing of a petition supported “* * * by a majority * * * of those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership * * * in compliance with Chapter 49 of the Session Laws of Alaska, 1945 * * *”. Proof of that factor is seemed sufficient to sustain the petition in the absence of “* * * a clear showing to the contrary.” The statutory presumption is not conclusive, and is refutable; and efficiently shifts the burden of proof to the appellees.

Such statutes in proper cases have received judicial approval as being within the province of the legislature. In this respect Hughes, C. J., said in *Bandini Co. v. Superior Court* (1931), U.S. 8, at page 18:

“The appellants make the further contention that the statute is invalid because of the provision of section 8b (supra p. 10) that ‘the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste.’ The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence

of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43; *Bailey v. Alabama*, 219 U.S. 219, 238; *Lindsley v. Natural Carbonic Gas Co.*, *supra*, at pp. 31, 82; *Manley v. Georgia*, 279 U.S. 1, 5, 6; *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642. In the present case there is a manifest connection between the fact proved and the fact presumed * * *

The Supreme Court in *Campbell v. Laclede Gas Company* (1886), 119 U.S. 446, had under review the following Missouri statutes:

“Section 3826. All patents for land lying within the State of Missouri granted to any person or persons by the President of the United States or the governor of this State, may be recorded in the office of the recorder of the county in which the lands are situated.”

“Section 3827. All copies of patents so recorded, or which may have heretofore been recorded, duly certified by the recorder under his official seal, shall be received in all courts in this State as prima facie evidence of the contents of such patents.”

The original patent was not available, and there was an attempt to impeach the county recorder's copy by a copy from the land office in Washington. Defend-

ants relied on Rev. Stat. Sect. 891. The Court, in conclusion, said at page 448:

“That the State of Missouri had a right to pass the statute which makes the record in the offices of that State of a patent from the United States *prima facie* evidence of the contents of that patent, does not seem to be doubted. Indeed, it was a very wise and needful provision; for without it the title to large quantities of land, which rested primarily in the patents from the United States, might be very difficult to establish by evidence of that title. By this statute parties were enabled to place this evidence in permanent form upon the records of the counties in which the land was situated, at the same time giving notice to all the world of their claim to such land.”

Page 449:

“* * * The words ‘evidence equally’, as used in the act of Congress, were not intended to mean that *in all* cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary. It could not have been intended to say that when the existence of the instrument is conceded, but a question arises as to some particular word or figure, the copy would be as convincing as the original.

“On the whole, we are of opinion that the *prima facie* case made by the record of the patent in the recorder’s office of St. Louis County is not overcome by what purports to be a copy of the same from the records of the General Land Office in Washington, and that the judgment of the Supreme Court of Missouri must be *Affirmed*.”

The telling reasons for a "record" in the *Campbell* case are equally present in the instant case. Certainly as to those persons entitled to participate in an annexation proceeding, and the use of a public record adaptable to that purpose, is clearly within the province of the legislature to provide by statute.

Courts must give full weight to valid statutes. In constructing or interpreting statutes so as to give full weight thereto the purpose of the act must be accorded recognition and the intent of the legislature given full effect.

"In this case, as in every other involving the interpretation of a statute, the intention of Congress is an all important factor. The greatest light is thrown on that intention in this case by an examination of the existing conditions and the anticipated evils against which by this legislation Congress sought to protect the country." *U. S. v. Stone & Downer Co.* (1927), 274 U.S. 225, 239.

See also:

Armstrong v. Nu-Enamel Corp., 305 U.S. 321;
Wis. C. R'd. Co. v. Forsythe, 159 U.S. 55.

Justice Reed recently restated judicial guides to the interpretation of statutes in *U. S. v. American Trucking Ass'ns.* (1940), 310 U.S. 534, at page 542:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not con-

tribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet many needs of a major occupation.

“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When the meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on superficial examination. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts’ conclusion as to legislative purpose will be unconsciously influenced by the judges’ own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information

for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.' "

See also:

U. S. v. Cooper, 312 U.S. 600.

The Alaska Courts adopt these, and the following rules of statutory construction (page 267):

"(12) It should also be borne in mind that the statute which we are particularly called upon to construe is an amendment to an existing statute, and that the rule in this regard is that:

" 'Amendments are to be construed together with the original act to which they relate as constituting one law, and also together with other statutes on the same subject, as part of a coherent system of legislation * * * The provisions of the amendatory and amended acts are to be harmonized, if possible, so as to give effect to each, and leave no clause of either inoperative.' 59 C.J., Section 645, pp. 1094, 1095.

" 'The amendatory and the original statutes are to be read together in seeking to discover the legislative will and purpose, and if they are susceptible of two constructions, one of which gives effect to the amendatory act while the other will defeat it, the former construction should be adopted.' 25 R.C.L. Section 291, p. 1067; Burling-

ton C. & N. R. Co. v. Dey, 82 Iowa 312, 48 N.W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477.

“ ‘Obviously, in order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be considered and brought into accord.’ 25 R.C.L. Section 247, p. 1006.” *U. S. v. Hardcastle* (1942), 10 Alaska 254, 267 and 268.

See also :

U. S. v. Dasher (1940), 9 Alaska 719, 729.

A proper concept of the legislative intent can be realized from a reading of the entire statute (sections other than 16-1-21 and 16-1-22 are set out in the Appendix). The legislature intended that:

1. Before the *advisability* of annexation be *considered*

a. A *majority* of the persons (owning property) likely to be affected by municipal taxation signify *tentative approval* by signing a petition; and

b. The City Council signify *tentative approval* for the people of the City by ordering the petition filed.

2. The Court based upon a showing of *these tentative approvals* may then consider the *advisability of the proposed annexation* with its attention directed by the statute to possible injury to private right, and the reasonableness and justice of the proposed annexation.

3. With Court approval of the advisability of annexation the *actual annexation* is then *affected by the favorable vote of property owners* (the persons most directly affected by the proposed change) both *within* the municipality and within the area to be annexed.

See:

In re Town of Sitka (1946), 11 A. 201.

There exists no legislative or constitutional requirement that the procedure for annexation take any particular form. In fact it is most often accomplished by an administrative procedure. That the legislature could have authorized the city to file a petition *without* signatures of persons owning property in the area affected is academic. The choice in defining the class of persons as *only* those who had registered their title is also one solely for the legislature. Had that been done, the Courts would be bound thereby. That the legislature provided for a rebuttable presumption only accomplishes the same purpose as a conclusive classification as far as affects the petitioner—for the statute itself places the burden of overcoming the presumption on the objectors.

It is obvious that the first step in annexation above noted is *tentative*. It is equally obvious that the legislature passed the amendment in 1947 to overcome the onerous burden of highly technical interpretations of the language of the act and facilitate the procedure leading to an election by defining the class. In an earlier proceeding involving the same area the

same Court ruled that testimony by one who had made a "last record owner" search of the real property records was incompetent to show even a "claim of ownership" unless coupled with proof of actual possession by the last record owner; and if the property was vacant he indicated he would quite likely hold an abstract of title necessary to make proper proof. Such a burden of proof was not the original legislative intent; and the amendment, probably consequent of the previous case, is the legislative design to facilitate the showing of a "petition by a majority".

The Court in stating:

"The fact that they showed there were 207 registered, shows that there were that many who registered, but it does not show that there are others in the area who owned interests in the area and who failed to register * * *"

completely ignores the presumption created by the statute that those *who have registered* are *all the owners* entitled to sign such a petition "*in the absence of a clear showing to the contrary.*" It is not incumbent upon petitioners to make a "clear showing" contrary to a presumption created in their favor! *U. S. v. Hardcastle* (1942), 10 Alaska 254.

II.

A VARIANCE IN THE PROOF FROM A STATEMENT OF FACT IN AN ANNEXATION PETITION THAT IS NOT IN ITSELF A MATERIAL ISSUE IS NOT FATAL, AND FORMS NO FOUNDATION FOR NONSUIT.

The Court also stated in granting the motion of appellees:

“* * * Well, their allegations were 282 owners of substantial property interests. Why, naturally, it is up to them to prove that * * *”

The error of the Court becomes obvious when we consider that had the proof *positively shown* that the petition was supported by 280 signatures by property owners, and that there were 281 owners in the area, *and none others*, the petition would have failed for lack of proof of the *allegation* of 282 owners! The same logic controls in both this instance and in the supposition; and the *whole legislative intent thereby defeated*.

The error of the Court was in looking upon the statement in the “petition” as an “allegation”. *This is clearly contrary to the intent of the statute!*

“Allegations” are statements by a pleader of an ultimate fact subject to proof upon which he relies for relief. The “allegation”, or ultimate fact in issue, in this case is “that the petition is supported by a majority”. The *number* is immaterial and cannot be considered an allegation. It matters not if it be proved to be 100, 207, 282, 310 or 3,100. The only materiality it has is that it is a “*fact*” (in issue) which must be

determined in order only to measure proof of the ultimate fact: the signatures of a majority.

The basis of the petition is "*support by a majority*". Just so is the basis of an action in debt *an obligation owing from the defendant*. Is a plaintiff in a debt action, although he has alleged the debt to be \$100.00, to be deprived relief because his proof was not exact, and only established the debt to be \$90.00?

Insofar as the statute requires a statement of the "number of owners * * *" it is requiring only an informative observation, and not a pleading. *It is not required that it be set forth in the petition*, but only that it be *stated* on the plat! In that the *number* of persons is a fact to be found by the Court from the evidence after resolving the contentions of the parties, it is manifestly impossible to ever state the figure exactly as the Court will ultimately find.

But most important is the fact that the figure, when found, is *used by the Court only*, and only to assist it in determining the ultimate fact of compliance by proof of the signatures of a majority. There are no minimums or maximums by the statute made jurisdictional. The "figure" plays no part in any conclusion by the Court, any findings by the Court, or in any election ordered by the Court.

The manifest intent of the legislature is that the statement be made to appraise the Court and possible protestants of the approximate number of separate ownerships involved in the proposed annexation. The reason for such a statement could as well be that of a fact of interest to the Court in determining the reason-

ableness of the annexation as in having any relation to *proof of signatures by a majority*.

Should the statement in the petition that there are 282 owners within the area proposed to be annexed be considered a pleading or "allegation", then the pleading should be considered amended to conform to the proof. It should be noted that appellant took the position before the lower Court that the pleading *was amended* by the proof and should be treated as amended by the Court in deciding the motion. No *formal* request to make a *formal amendment on the record* was made by counsel; and the record shows that *after understanding the position of appellant* the Court rules without commenting on whether he deemed the pleadings amended, and without allowing any time for amendment. *He ruled and left the bench.*

The position of appellant was made clear to the Court. The parties were before the Court ready with their evidence. If the Court was of the opinion the "allegation" controlled he should at least have afforded an opportunity for amendment; and in view of the obvious reliance by appellant on a *prima facie* showing at least have offered an opportunity to re-open, if not actually under a duty to do so. This Court established in *Ringstad v. Grannis* (1947), 189 F. (2d) 289, 11 Alaska 269, that "A lawsuit is not a game between opposing counsel."

III.

THE VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IS SUCH AS IS DIRECTED BY THE STATUTES TO BE DISREGARDED BY THE COURTS IN ARRIVING AT A DECISION ON THE MATERIAL ISSUE.

The difference between the "allegation" of 282, and the proof of 207 owners is one of degree. This is a variance of the proof from the pleadings, the effect of which is governed by the provisions of A.C.L.A. Sections 55-5-71, 72, 73, 76 and 81. The entire opinion of this Court written on petition for rehearing in *Balanbanoff v. Kellogg* (1940), 118 F. (2d) 597, 599; 10 Alaska Reports 11, 18 is set forth as a concise and cogent comment on the foregoing sections:

"Healy, Circuit Judge

"(7, 8) Appellant has petitioned for rehearing. The chief proposition urged in support of the petition is that the court lacked power to treat the complaint as amended to conform to the proof. Petitioner says that the governing rule is contained in section 3456, Compiled Laws of Alaska, 1933, and that this statute requires that the amendment be made before submission of the case.

"Rule 15(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides in part: 'When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to

raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.'

"Whether the federal rules are applicable to trials in Alaska we need not inquire. This particular rule is merely an application of the principle prevailing generally in the states and territories having systems of code pleading. The Alaska statutes, as found in chapter 78, sections 3451 et seq. of the 1933 Code, are in the main identical with those of the code states. Section 3451 provides: 'No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits * * *'. Section 3452 states 'When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.' And Section 3461 provides that 'The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.'

"The view here expressed is fully supported by *Black v. Teeter*, 1 Alaska 561, at pages 564, 565.

"Rehearing denied."

(These sections in A.C.L.A. are: 3456—55-5-76; 3451—55-5-71; 3452—55-5-72; 3461—55-5-81.)

In quoting Section 3451 (A.C.L.A. 55-5-71) the last sentence was omitted in the opinion. The entire section is:

“55-5-71. VARIANCE. WHEN MATERIAL: PROOF: ORDERING AMENDMENT. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.”

In the instant case appellees certainly cannot complain that they were misled. One of them alleges that there were more than 310 owners in the area, proof of which would leave the petition unsupported by the signatures of a majority. Mr. Hurley in his argument says (Tr. p. 132):

“* * * according to our figures they had to have 155 signers to have a valid petition. *People we have checked on and know* have valid property interests in land and they are entitled to vote, or were entitled to sign the petition.”

Certainly the appellees were prepared for proof on the issue. From the very nature of the issue they had to know the *name and claimed ownership* of each individual possible to count. When we proved, as an illustration, 107 *identified individuals* who signed as

being qualified they must prove 108 *different individuals*, who *did not* sign, equally qualified in order to defeat the petition. With a petition supported by 144 signers they must prepare proof:

(a) That certain signers had no right to sign;
and

(b) That more than rightfully signed had a right to sign but failed to do so.

They would block our every effort to show any signer to have any interest in the area to be annexed: then facilitate showing any title in those who had not signed.

It is likewise obvious from the very nature of the proceeding that the petitioner would not be prudent in relying solely on the presumption in filing a petition. It must anticipate that there are owners who have failed to register, and that a protestant may be able to add to the number of persons registered others “* * * by a clear showing * * *”. Thus, to be prudent, it must support its petition by the signatures of a majority *as well of those who failed to register but that might possibly by the Court be held to be entitled to sign*. That such prudence should estop appellant from the benefits of the presumption is to defeat the purpose of the presumption.

To urge that the proof must *exactly fit the allegation* of 282 without variation is to also permit the defeat of the petition upon a showing by appellees of 283, without regard to uncontroverted proof of more than a majority of 283. A variance one way should

logically be no different, or any less fatal than one the other way.

The position of appellant can be restated in the language of the Court in *Jacques v. Fourthman* (Penn. 1890), 20 Atl. 802, 803:

“Green, J. The court below having granted a compulsory nonsuit, and refused to take it off, the evidence given by the plaintiff must be taken to be true, together with every inference of fact which the jury might lawfully draw from it. *Miller v. Bealer*, 100 Pa. St. 585; *McGrann v. Railroad Co.*, 111 Pa. St. 171, 2 Atl. Rep. 872; *Jones v. Blanc*, 116 Pa. St. 190, 9 Atl. Rep. 275. A peremptory nonsuit is in the nature of a judgment for defendant on demurrer to evidence, and if there is any evidence, no matter how slight, if it is more than a mere *scintilla*, which alone would justify an inference of the disputed facts on which the plaintiff’s right to recover depend, it must be submitted to the jury.”

The motion in the instant case is a demurrer to the petition *and the evidence*. The petition alleges it is supported by a majority. *So far as the proof goes it shows just that!* The proof is not controverted, and by the motion admitted to be correct. This is certainly no failure of proof as defined by A.C.L.A. 55-5-73:

“55-5-73. FAILURE OF PROOF. When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.”

and the error in the statement of the number of persons in excess of the proved registrants is a defect. A.C.L.A. 55-5-81 decrees:

“55-5-81. DISREGARD OF DEFECTS. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”

It is not claimed, nor can it be claimed that any substantial right of appellees was or could be affected.

The practical effect of the nonsuit is to force the filing of a new petition stating the number to be 207. In all other respects the pleading would be the same, and the evidence identical on a new trial. The ruling, then, is to no effect, except the very substantial one of forcing petitioner to the delay and expense of circulating a new petition, and a republication of its notice. Of course interim changes in ownership would affect some change in the evidence.

In this regard the Alaska Court in *Black v. Teeter* (1902), 1 Alaska 564, 565:

“All the substantial rights of the parties were submitted to the jury without objection. The error complained of is only technical. I am satisfied that the verdict rendered is in accord with both the law and the facts, is just and right *and would be the result of another trial*. No substantial right of the defendants is taken away or affected unjustly by the verdict, and the error or defect ought, therefore, to be disregarded by the court.”

To a similar result is the Court's opinion in *Leaman v. Thompson* (Wn. 1906), 86 P. 926, 928:

“In view of appellant's testimony as to express promises after the divorce, and of the other testimony, the above averments were broad enough to include it. But, in any event, *after the court indicated that it did not think the averment sufficient*, appellant asked leave to amend the complaint in that particular. *This, it is true, was after the plaintiff had rested, and after the motion for nonsuit was interposed but before the ruling thereon.* On the court's theory of the insufficiency of the complaint to support the testimony of a later promise, we think at least permission to amend should have been granted when it was requested. *To force appellant to submit to a nonsuit would simply send the parties out of court until a new action might be brought, when the allegations offered would be made in a new complaint. This would merely protract the litigation. The parties and the appellant's evidence were already before the court and jury.* No objection was made by respondent that the amendment would surprise him or place him at a disadvantage if the trial should proceed with the amendment made. If the amendment had been of sufficient materiality and a sufficient showing of prejudice to respondent had been made, a continuance for a time might have been granted and terms interposed against appellant. *Applying the court's own theory of the case to the record of the trial as it is brought before us, we think it was an abuse of discretion to refuse the amendment. While, as we have said, we think the complaint was broad enough when all of its allega-*

tions were considered to cover the evidence submitted, yet when the appellant sought to conform to the court's theory and make the complaint more specific so as to unmistakably conform to the proofs submitted, the amendment should have been allowed."

See also:

Ringstead v. Grannis (1947), 159 F. (2d) 289 (supra).

The force of these statutes and cases, as applied to this case, is to, under the circumstances, be mandatory upon the Court to have considered the petition amended to conform to the proof. The positive statutory direction that the Court disregard such variance, *direct the fact to be found according to the evidence or order an immediate amendment.*

In the face of appellant's statement that the allegation was in error (Tr. 130), and reliance upon the statutory presumption (T. 130-131); and appellees' stated intention to prove a greater number, (Tr. 131-132), the Court was compelled by these statutes and authorities *consider* the complaint amended to conform to the proof (that being the same as, for the purpose of a nonsuit motion, directing the fact to be found in accordance to the evidence). And if the Court was intending to rule against the existence of a presumption it was by those statutes then compelled to *order an immediate amendment.*

The failure of the Court to follow the mandate of the statutes, none of these matters being discretionary,

is error justifying this Court in reversing the order granting the motion for nonsuit and dismissing the petition.

Dated, Fairbanks, Alaska,
February 17, 1950.

Respectfully submitted,
COLLINS & CLASBY,
CHAS J. CLASBY,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

I.

A.C.D.A.

22-2-1. DUTY OF OWNER OR TRANSFEREE TO FILE STATEMENT: EXEMPTIONS: PENALTY: LIEN. It shall be the duty of each owner of land, other than of land to which the United States, or an agency or instrumentality thereof holds title, or which is owned by the Territory or a subdivision, agency or instrumentality thereof, or by an Indian Nation tribe, band or a member thereof, or is located within an incorporated town, to file in the United States Land Office for the District in which the land is situated, on or before June 30, 1946, a sworn statement, or a statement signed by two witnesses when it is impossible to obtain a sworn statement, giving his name, his post office address, a description of the tract of land, its acreage, use, character, and any other information necessary for the purposes of this Act. Upon a transfer of title to a tract of land on or after January 1 of any year, a statement in the form required by this section must be filed by the owner of such newly acquired tract of land on or before December 31 of that year, unless such owner is within one of the classes exempted by this section from filing such a statement. The owner of a tract of land who has made a proper return as to such land in any year, as prescribed by this section, need not thereafter file a statement under this section. Upon failure to file a statement, as required by this

section, the owner shall be subject to a penalty of \$5 which shall be a lien against the land as of January 1 of the ensuing year, and subject to collection as hereinafter provided.

II.

A.C.L.A.

16-1-23. ELECTION: NOTICE: BALLOTS: ELECTION JUDGES AND CLERKS: CANVASS: CERTIFICATE. The council of such city shall thereupon submit the question to the electors of such city and to the electors residing in the territory proposed by said petition to be annexed to such city. Such question shall be submitted at a special election to be held for that purpose, and such council shall give notice thereof, by publication in a newspaper of general circulation in such city and in such territory so proposed to be annexed or nearest thereto, for a period of four weeks prior to such election; also by posting notice thereof in three public places within such city and three public places in such territory for a like period. Such notices shall be posted and the first publication of such notice in the newspaper shall be at least four weeks before the election. Such notice shall distinctly state the proposition to be so submitted and shall designate specifically the boundaries of the territory so proposed to be annexed, and the electors shall be invited thereby to vote upon such proposition by placing upon their ballots the words "for annexation to the city of " or "against annexation to the city

of," or words equivalent thereto. Such council shall also designate the time and place or places at which the polls will be open within such city and in such territory so proposed to be annexed, which place or places shall be those usually used for that purpose within such city and also within such territory, if any such there be. Such council shall also appoint and designate in such notice the names of the judges and clerks of election. The judges and clerks before entering upon the discharge of their duties at such election shall each take and subscribe before an officer authorized to administer the same, an oath for the honest and faithful discharge of his or her duties as such judge or clerk. In case of the absence or inability of any judge or clerk appointed to act at such election, the qualified electors present at the polls before proceeding to vote, may choose an elector to act in his or her place from among their number, who shall duly qualify as aforesaid before entering upon the discharge of his or her duties as judge or clerk at such election. Such council shall meet on the Monday next succeeding the day of such election at one o'clock p.m. and canvass the votes cast thereat, and the council shall issue under their hands, and the seal of the city, a certificate showing the number of votes cast in favor of annexation and the number of votes cast against the annexation, separately stating the number of votes for or against in the city and in the territory sought to be annexed. Said certificate together with all the ballots cast and the oaths of the judges and clerks of election shall immediately be filed with the

clerk of the district court in the proceedings, authorizing said election.

A.C.L.A.

16-1-24. DECLARATION OF ANNEXATION. If it shall appear to the district court or the judge thereof from the certificate of election filed with the district court as aforesaid, that two-thirds of the votes cast at said election in the territory sought to be annexed were in favor of the annexation and that a majority of the votes cast in the city were also in favor of the annexation, and that the provisions of law relating to annexation have been substantially complied with, then the district judge shall by an order in writing entered in the records of the court duly adjudge and declare such annexation and the said territory shall, from thenceforth, be a part of the city. Such order shall describe the boundaries of the territory annexed and give the name of the city to which it is annexed.

A.C.L.A.

16-1-27. FILING COPIES OF ORDER OF ANNEXATION OR EXCLUSION. Whenever the court shall by order annex any territory to a city or exclude any territory therefrom, a certified copy thereof shall be filed in the office of the Auditor of the Territory, another in the office of the commissioner of the precinct in which the corporation is situated and a third in the office of the city clerk of the city to which the territory has been annexed or from which the territory has been excluded.

A.C.L.A.

16-1-28. QUALIFICATIONS OF ELECTORS. The qualifications of an elector for election in this Article provided for, shall be as follows: He or she shall be a person of the age of twenty-one years or more and shall be the owner of substantial property interests in land, buildings or improvements on land or tideland within said city or within the territory proposed to be annexed to or excluded from said city.

No. 12,348

IN THE

United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a municipal
corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, INC., and CHARLES
SLATER,

Appellees.

BRIEF FOR APPELLEE, CHARLES SLATER.

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorney for Appellee,

Charles Slater.

FILED

APR - 6 1950

PAUL P. O'BRIEN, &

CLEI

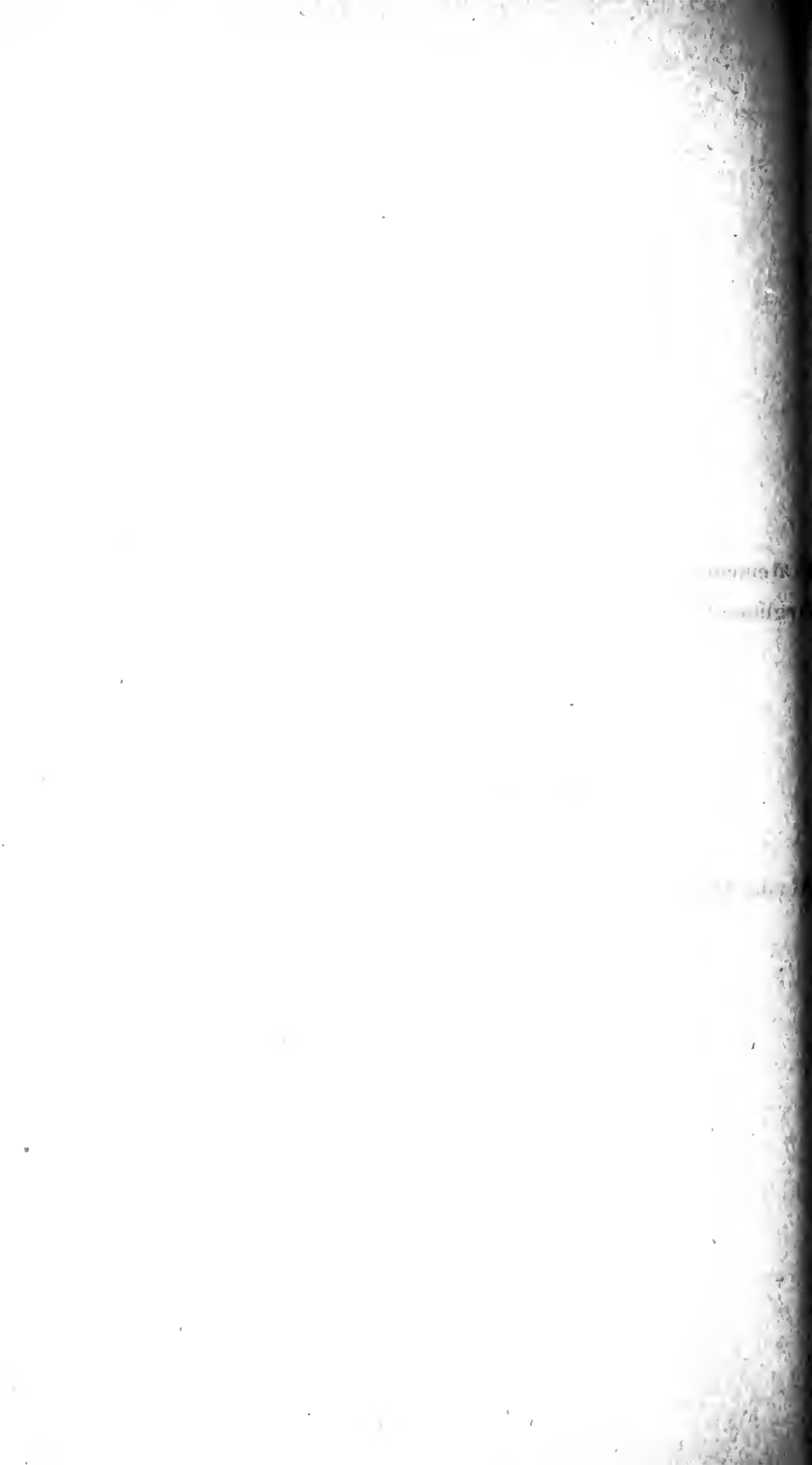


Subject Index

	Page
Statement	1
Argument	2

Table of Authorities Cited

	Pages
Alaska Compiled Laws, Section 16-1-22.....	1, 2



No. 12,348

IN THE
United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a municipal
corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, INC., and CHARLES
SLATER,

Appellees.

BRIEF FOR APPELLEE, CHARLES SLATER.

STATEMENT.

The only assignment of error presented by Appellant is that the Court erred in dismissing its petition. This involves the construction of Sec. 16-1-22 of the Alaska Compiled Laws, Annotated, which is copied on pages 3 and 4 of appellant's brief.

The act in question specifically states what the petition for annexation must contain. Among other things it provides:

1. The petition must be signed by a majority of the owners of substantial property interest in land or posses-

sory rights in land, tide lands, or improvements on land or tide lands within the limits of the territory so proposed to be annexed.

2. That the petition must contain the number of owners of property in the territory proposed to be annexed.

The act also provided that the Court shall order an election unless the petition fails to comply with the requirements of the act.

The petition alleged that there were 282 owners of property within the area and appellee admitted that there were 282 owners and affirmatively alleged that there were more than 310 such owners.

The petition alleged that the persons who signed the petition were qualified to sign and that they constituted a majority of the owners of substantial property interest in land or possessory rights in land or improvements upon land within the limits of the territory sought to be annexed. This allegation of the petition was denied by appellee.

The evidence offered by appellant at the hearing in support of the allegations contained in its petition showed 207 of the alleged and admitted 282 owners within the area and that 106 signed the petition.

ARGUMENT.

The attorney for appellant bases his argument on that part of the act (last paragraph of Sec. 16-1-22, A.C.L.A.) which provides that the owners of land within the area

sought to be annexed who filed statements of their ownership in the Land Office shall be presumed to be such owners in the absence of a clear showing to the contrary. He contends in effect that this paragraph of the act repeals that part of the act which requires that the petition must be signed by a majority of the owners of substantial property interest in land or possessory rights in lands, tide lands, or improvements upon lands or tide lands within the limits of the territory so proposed to be annexed. In plain words it is his contention that in an area sought to be annexed where there are 1,000 admitted owners of interests in property entitled to sign the petition, and that if only 5 of them have filed their statement of ownership in the Land Office, that upon a showing to the Court that 3 of these signed the petition it becomes the duty of the Judge, on his own motion, to immediately amend the petition, find that there are only 5 owners of property within the area and that the 3 owners constitute a majority, allow the petition and order an election.

The act also provides that in the event of an election all persons 21 years of age or more, who are the owners of substantial property interest in land, buildings or improvements on land or tide land within the territory proposed to be annexed are entitled to vote. To be consistent, counsel must contend that only the 5 who registered their statement in the Land Office would be entitled to vote.

As a matter of fact, the only purpose of this paragraph of the act is to make the filing of the statement of ownership in the Land Office *prima facie* evidence that the person filing the statement is the owner of land. This show-

ing is sufficient unless competent and satisfactory evidence to the contrary is shown. It merely shifts the burden of proof as to those persons filing their statements from the petitioner to the protestants.

There is nothing in the act to support the contention that the Legislature intended to force the people to the expense of an election on the filing of a petition signed by less than a majority of the owners of property interests in the area proposed for annexation.

There is nothing in the act that creates a presumption that persons who have not registered their titles or who are not required to register titles are not interested. Only the actual owners of land are required to file their statements in the Land Office. It seems ridiculous to claim that a person occupying premises in the proposed area under a contract of sale, with a deed in escrow, with only a small payment to make before receiving his deed, is not interested. The record owner who has filed his sworn statement would have no interest whatever in the land after the final payment under the contract.

There is no question about the right of the Court to consider the complaint in an action, amended to conform to the proof, but this principle of law is not involved in this proceeding. In the first place, it was not contended by counsel that there were not 282 owners of substantial property interest in land or possession in land or improvements in land in the territory sought to be annexed. He claimed and still claims that the only persons interested and to be considered were the owners of land, who were required to file and did file their sworn statements.

There is nothing in the act which indicated that the Court should exclude and not consider all qualified owners of interests in property who were not required to file certificates. At the trial no evidence of any kind was presented, or was it claimed that more than 106 qualified persons had signed the petition.

The whole purpose of the hearing was to enable the Court to determine whether or not there should be an order for an election. If the petitioner failed to comply with the requirements of the act or if it was not shown that the required number of competent persons had signed the petition, it was the duty of the Court to deny the petition. It may be that the motion should have been that the petition be dismissed and not for a nonsuit but that is immaterial because there was no evidence before the Court that the required and qualified number of persons had signed the petition. It was not incumbent upon protestants to disprove something which the petitioner had made no attempt to establish.

If the Legislature had intended that the mere filing of a petition was all that was necessary it would have said so in plain words and made no provision for a hearing on the petition.

It is the contention of counsel that any kind of a petition can be filed, regardless of the correctness of the allegations and that then the burden of proof shifts to the protestants to prove that the admitted allegations are true and that those that he denies are admitted unless he produces satisfactory evidence that they are not true. There is nothing in the act that supports his contention.

To hold that the protestant should prove petitioner's case for it would be contrary to all established judicial procedure. The order dismissing the petition should be affirmed.

Dated, Fairbanks, Alaska,
April 3, 1950.

Respectfully submitted,

JULIEN A. HURLEY,

Attorney for Appellee,
Charles Slater.

No. 12,348

IN THE
United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA, a Municipal
Corporation,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, INC., and CHARLES
SLATER,

Appellees.

BRIEF FOR APPELLEE
UNITED STATES SMELTING REFINING AND
MINING COMPANY.

SOUTHALL R. PFUND,
Standard Oil Building, San Francisco 4, California,
Attorney for Appellee
United States Smelting Refining and
Mining Company.

PILLSBURY, MADISON & SUTRO,

ALLAN R. MOLTZEN,

Standard Oil Building, San Francisco 4, California,
Of Counsel.

FILED

APR - 6 1950

PAUL P. O'BRIEN,
CLERK

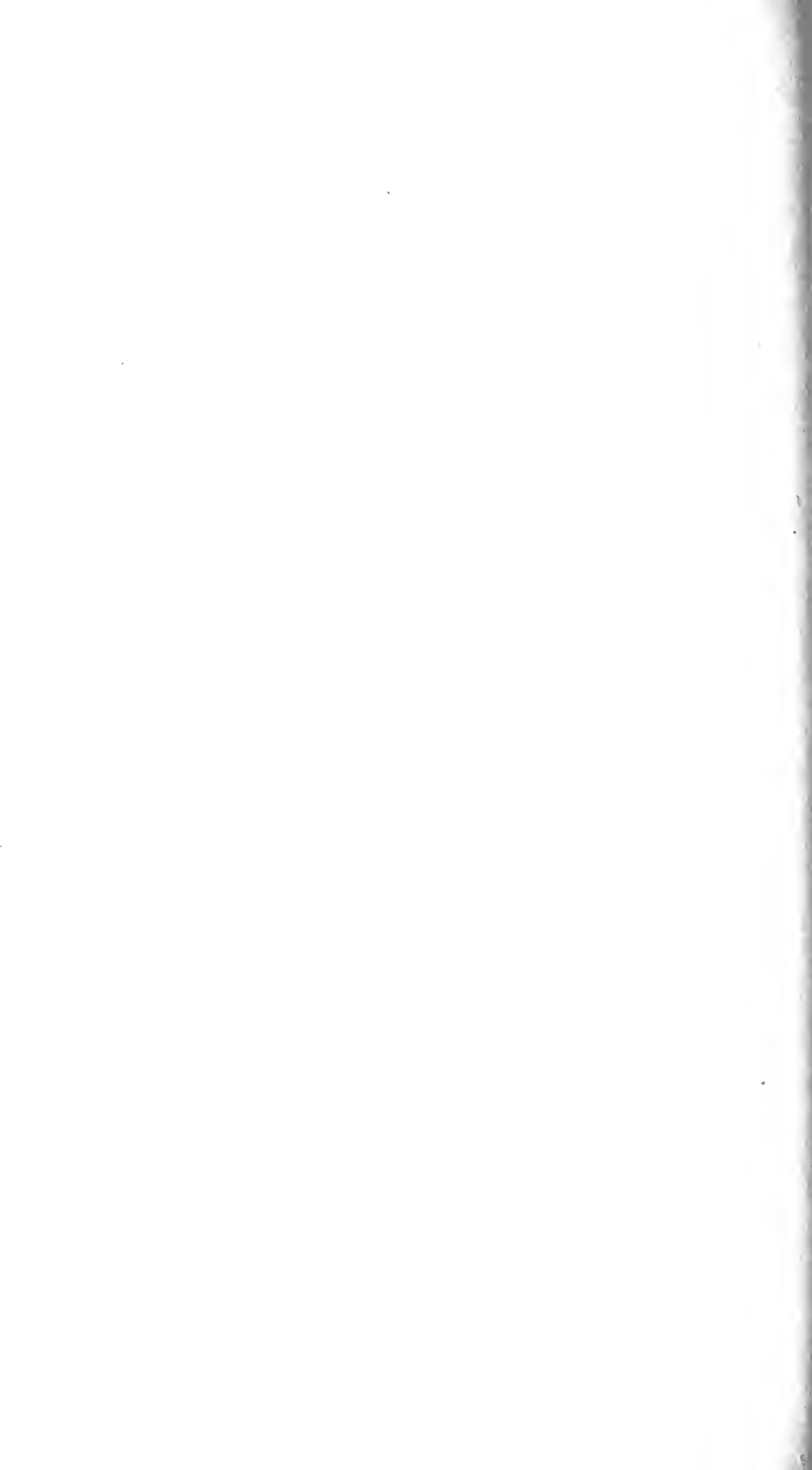


Table of Contents

	Pages
Statement as to jurisdiction	1
Statement of the case	2
Summary of argument	4
Argument	4
1. Appellant, in attempting to prove the total number of land owners in the area sought to be annexed, failed to make that required proof by merely showing that 207 persons had registered their claims of ownership of certain parcels of land in the General Land Office	4
2. Appellant's failure to prove the total number of land owners constituted a failure of proof rather than an immaterial variance	11
Conclusion	14

Table of Authorities Cited

	Pages
Alaska Compiled Laws Annotated, 1949, sec. 16-1-22 (formerly Compiled Laws of Alaska, 1933, sec. 2419, as amended)	2, 5
Alaska Compiled Laws Annotated, 1949, sec. 55-5-71	12
Laws of Alaska, 1945, ch. 49; Alaska Compiled Laws Annotated, 1949, secs. 22-2-1—22-2-18	5
Laws of Alaska, 1947, ch. 50; Alaska Compiled Laws Annotated, 1949, sec. 16-1-22	7
Laws of Alaska, 1949, ch. 106	10
Rules of the United States Court of Appeals for the Ninth Circuit, Rule 20, par. 2(d)	4



IN THE
United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA, a Municipal
Corporation,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, INC., and CHARLES
SLATER,

Appellees.

BRIEF FOR APPELLEE
UNITED STATES SMELTING REFINING AND
MINING COMPANY.

STATEMENT AS TO JURISDICTION.

This is an appeal from a judgment of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division, dismissing appellant's petition for the annexation of certain lands to the Town of Fairbanks, Alaska.

For the purposes of this appeal appellee United States Smelting Refining and Mining Company, hereinabove called United States Smelting, Refining and Mining Com-

pany, Inc., does not question appellant's statement of the jurisdiction of the district court over the subject matter of the action (App. Br. 2) and admits the jurisdiction of the Court of Appeals to review the judgment of the district court.

STATEMENT OF THE CASE.

On or about November 9, 1948, the Town of Fairbanks, a municipal corporation in the Territory of Alaska, purporting to act under the laws of Alaska relating to annexation by municipalities (A.C.L.A. 1949, sec. 16-1-22, formerly C.L.A. 1933, sec. 2419, as amended), filed in the District Court for the Territory of Alaska, Fourth Judicial Division, its petition to annex certain nearby lands (R. 2). The statute requires that the petition must be "signed by a majority of the owners of substantial property interests in land or possessory rights in land * * * within the limits of the territory so proposed to be annexed * * *" and that "there shall be attached thereto a plat * * * stating * * * the number of owners of property * * *" in said territory.

Inter alia, the petition alleged there were 282 owners of substantial property interests in land or possessory rights in land or improvements upon land in the territory sought to be annexed (R. 5). The material allegations of the petition were put in issue by the answers of appellees (R. 24, 30). Appellee United States Smelting Refining and Mining Company denied the allegation of ownership (R. 25). Appellee Slater alleged that there were more than 310 such owners (R. 31).

At the hearing appellant introduced some evidence in support of its petition. The only evidence as to the number of owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory sought to be annexed was the testimony of the assistant to the Territorial Land Registration Agent. She testified that the names of 207 persons had been registered in the General Land Office as owners of land in said territory (R. 123) and that 106 of those persons had signed the petition (R. 123). Appellant's counsel offered no further evidence of ownership, and voluntarily rested (R. 128). Appellees moved for a nonsuit or dismissal of the petition on the ground that appellant had failed to prove that the petition was signed by a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory sought to be annexed (R. 128). After argument by counsel for both sides, the motion was granted and the petition dismissed (R. 132).

SUMMARY OF ARGUMENT.

1. The granting of a nonsuit and dismissal of appellant's petition by the court below were proper because appellant failed to prove the total number of owners of substantial property interests or possessory rights in land in the area sought to be annexed. In order to show that it had obtained the signatures of a majority of the owners of substantial property interests or possessory rights in land in such area, it was mandatory that appellant prove

the total number of such owners. In justifying the Assistant Registration Agent's testimony, appellant relied solely upon the 1947 amendment to the Alaska annexation statute which provided merely that owners of land who filed statements asserting ownership in the General Land Office would, for purposes of annexation proceedings, be presumed to be the owners of substantial property interests. This amendment did not provide that the owners who registered would be presumed to be all the owners of land in the area. Furthermore, by its verified petition appellant has admitted that there were more owners of substantial interests than those registered, and it was incumbent upon it to show how many more.

2. Appellant's failure to meet the mandatory requirement of proving the total number of owners constituted a failure of proof rather than an immaterial variance. No amendment to the petition could rectify this failure of proof, and the nonsuit was properly granted.

ARGUMENT.

1. APPELLANT, IN ATTEMPTING TO PROVE THE TOTAL NUMBER OF LAND OWNERS IN THE AREA SOUGHT TO BE ANNEXED, FAILED TO MAKE THAT REQUIRED PROOF BY MERELY SHOWING THAT 207 PERSONS HAD REGISTERED THEIR CLAIMS OF OWNERSHIP OF CERTAIN PARCELS OF LAND IN THE GENERAL LAND OFFICE.

Since appellant's specification of error does not state in particular wherein the court below erred as is required by Rule 20, paragraph 2(d) of this Court, appellee is not certain of appellant's position here. Irrespective of appellant's contentions, however, we contend that the district

court did not err in granting a nonsuit and in dismissing appellant's petition.

The only question presented by this appeal is whether appellant's showing that 207 persons claimed substantial property interests or possessory rights in particular parcels of land constituted proof that those persons were the only owners of land in the territory sought to be annexed.

In an annexation proceeding such as this, Alaskan law makes it mandatory for the petitioner, appellant here, to prove that a majority of owners of substantial property interests or possessory rights in land have signed the petition (A.C.L.A. 1949, sec. 16-1-22; formerly C.L.A. 1933, sec. 2419, as amended; set forth in full in appendix hereto). Proof of a majority necessarily requires proof of the total number.

The court below was correct in dismissing the petition on the ground that appellant had failed to prove its case. Appellant alleged 282 owners of substantial property interests or possessory rights in land, but its only showing was the testimony of the assistant to the Land Registration Agent (R. 123) that 207 persons had filed statements of ownership of interests in particular parcels of land in the General Land Office pursuant to the Land Registration Act of 1945 (Laws of Alaska 1945, ch. 49; A.C.L.A. 1949, secs. 22-2-1—22-2-18, set forth in part in appendix hereto). Appellant did not and could not show that all the land in the area sought to be annexed was claimed by those 207 persons, and it made no attempt to prove the total number of owners in the area.

Appellant voluntarily chose to rest on this showing in spite of the fact that the list of signers of the petition (R. 9-19) reveals many persons claiming an interest in land who had not registered their claims. The same list, and the plat attached thereto which is an exhibit on this appeal, shows that a portion of the area sought to be annexed was subdivided into lots and blocks. Appellant could have examined the lot and block books to determine the ownership of land not covered by registration statements. The list of signers of the petition also shows that documents evidencing interests in parcels of land were recorded or filed in at least seven different depositories, several of them being public depositories. Since the burden of proof was on appellant, the very least that it was required to do under the annexation laws was to examine these sources of information in an effort to prove total ownership. Appellant's petition alleging 282 owners of interests in land was verified by the Mayor of the Town of Fairbanks and also by a property owner. Some examination must have been made and some evidence adduced to support this verified statement on the date the petition was filed. The same evidence must have been available on the date of the trial. Nevertheless, appellant made absolutely no effort to introduce such evidence and chose to rely only on the records of the General Land Office, admittedly incomplete, in proving its case.

Standing by itself, the testimony introduced by appellant would not be sufficient even to prove the individual ownership asserted by the land registration statements, since it is not the best evidence, is a conclusion of law and is not sufficiently relevant to overcome these other ob-

jections. As was pointed out by the assistant to the Land Registration Agent when she testified (R. 86, 87, 92, 93), anyone could file a statement of ownership for any number of people if the person filing took the required oath.

Considered alone this testimony could by no stretch of the imagination be sufficient to prove that there were *only* 207 owners. Yet this is just what appellant is claiming, and the claim is based entirely upon a 1947 amendment (made ineffective by a 1949 modification of the Land Registration Act of 1945) to the annexation laws of Alaska previously passed in 1923. The 1947 amendment reads as follows:

“Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 [§§ 22-2-1—22-2-18 herein], shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary” (A.C.L.A. 1949, sec. 16-1-22; Laws of Alaska 1947, ch. 50).

The statute says that “Those owners * * * who have filed a statement * * * shall be presumed to be the owners of substantial property interests in land or possessory rights in land.”* This provision makes the evidence intro-

*Appellant's bald assertion (App. Br. 19) that the statute creates a presumption “that those *who have registered* are *all the owners* entitled to sign such a petition” is simply contrary to the express language of the statute.

duced by appellant sufficient to prove the ownership asserted in the statements. It does not, as appellant contends, make the evidence sufficient to prove the total number of owners, and make those persons who have registered with the Land Office *prima facie* "all that are entitled to be considered interested" (App. Br. 8).

This is the crux of the case, and unless "the owners" means the same thing as "all the owners" the nonsuit was properly granted.

Appellant has devoted nine pages of its brief (App. Br. 10-19) to quoting and discussing general decisions, although none of them is in point on the particular issue raised by appellant. We are in entire agreement with the "Hornbook" law stated in those cases that statutes are to be interpreted according to the plain, ordinary meaning of the language used and to the declared purpose and intention of the legislature.

The plain, ordinary meaning of the 1947 amendment is that individual ownership of a substantial property interest or possessory right in a parcel of land may be proved in the first instance in annexation proceedings by the statement of ownership filed in the Land Office instead of offering proof of title in fee, under contract of sale, or some lesser estate, or even tenancy for years.

Inasmuch as the records of the 1947 session contain no discussion of the amendment, the declared purpose of the legislature must be ascertained from what it said, from what it did not say, and from the results flowing from various interpretations.

The 1947 legislature said "the owners"; it did not say "all the owners." Had it meant "all the owners" it would have said "all the owners." If it had said "all the owners" then appellant could make a prima facie case by showing that only one person had filed a statement of ownership, although in fact there were many owners. Such a ridiculous result is in itself evidence that the legislature did not intend to say "all the owners."

In an attempt to invent a purpose behind the 1947 amendment beyond that expressed in the statute itself, appellant has soared beyond the record into the realm of fancy. We recognize that the discussion of the earlier annexation proceeding (App. Br. 18, 19) is not properly a part of this case; but we also recognize that it reveals the fallacy of appellant's position. Thus in connection with the earlier annexation proceeding appellant states that the district court:

"* * * ruled that testimony by one who had made a 'last record owner' search of the real property records was incompetent to show even a 'claim of ownership' unless coupled with proof of actual possession by the last record owner; and if the property was vacant he indicated he would quite likely hold an abstract of title necessary to make proper proof" (App. Br. 19).

This statement by appellant contradicts its later assertion that the 1947 amendment was "the legislative design to facilitate the showing of a 'petition by a majority'" (App. Br. 19). It is clear from the statement that the district court in the earlier proceeding was considering

the method of proving the claims of various persons to individual parcels of land in the area sought to be annexed, not the method of proving the total number of owners.

Appellant has even gone so far as to infer that the Land Registration Act of 1945 was passed so that in 1947 the legislature could amend the annexation laws and provide that persons filing a statement of ownership should be presumed to be "all the owners" of land (App. Br. 9-10). If this were so, why did the legislature wait two years and then omit the word "all"?

Appellant has failed to call this court's attention to the Act of March 25, 1949 (Laws of Alaska, 1949, ch. 106) which provides in part as follows:

"Section 1. That the provisions of the Land Registration Act, Secs. 22-2-1 to 22-2-18 ACLA 1949 are hereby modified as follows:

(a) On and after July 1, 1949, the land registration requirements set forth in said sections shall cease to be of further effect, but rights and liabilities accrued under said provisions and regulations made pursuant thereto prior to said date shall remain in full force and effect.

* * * * *

(c) It is the intent and purpose of this Act to secure a check of the list of patented properties which have been duly registered in each judicial division against the records of the Bureau of Land Management for the information and use of the respective divisional boards of assessment and their assessors in making up tax rolls under the purview of the Territorial Property Tax Act."

The legislature itself has succinctly stated the real purpose behind the Land Registration Act of 1945 in subparagraph (c) above. That purpose was solely to get property outside incorporated towns on the assessment rolls.

Possibly appellant overlooked this 1949 Act (enacted *after* the trial of this case but *before* the appeal was taken) because subparagraph (a) repealed the land registration requirements of the 1945 Act and abolished the evidentiary effect of the statements of ownership. Under any theory of this case this would require appellant to prove not only total ownership but also the ownership asserted in each statement.

Appellant thus finds no support for its contrived theory either in the language of the 1947 amendment, in the declared purpose and intention of the legislature, in the practical results to be expected or in its own procedure in preparing and filing the petition for annexation.

2. APPELLANT'S FAILURE TO PROVE THE TOTAL NUMBER OF LAND OWNERS CONSTITUTED A FAILURE OF PROOF RATHER THAN AN IMMATERIAL VARIANCE.

From the previous discussion it is apparent that appellant's argument (App. Br. 20-31) that this failure to prove total ownership is an immaterial variance rather than failure of proof is without merit. We do not claim, as appellant asserts (App. Br. 20, 26), that it had to prove 282 rather than 281 or 283 owners. We claim only that appellant must prove something, be it 281, 282, 283 or some

other number. Had appellant proved that there were 281 owners, or even only one owner, there would be a variance, and under Alaska Compiled Laws Annotated, 1949, section 55-5-71, the pleading should be amended to conform to the proof. But before there can be a variance requiring or permitting amendment, the total number of owners must be proved. This is just what appellant failed to prove.

Appellant's attack on the lower court (App. Br. 22) is unjustified. It again illustrates appellant's failure to see the issue in the case. We agree with appellant's remark that "A lawsuit is not a game between opposing counsel," but this should not be used as an excuse for failure to prove a case. Appellant complains that the Court did not permit it to amend (although appellant did not ask to do so), and that the Court did not amend the petition on its own motion (in spite of appellant's failure to ask that it be amended), and that the Court did not comment "on whether he deemed the pleadings amended" (App. Br. 22) (though appellant asked no such comment). No amendment could have any effect on the ultimate outcome of this case. The fact remains that appellant voluntarily rested (R. 128), did not ask permission to reopen and admits that it had no more evidence (App. Br. 28).

It is obvious that the Court realized that whether the petition was amended or not would make no difference in the ultimate decision, for in ruling on the motion it said:

"The fact that they showed there were 207 who registered, shows that there were that many that registered, but it doesn't show that there are others who

owned interest in the area and who have failed to register, so the motion is well taken and will be granted'' (R. 132).

Assuming that the Court had either permitted an amendment or considered the petition to have been amended (as it may well have done), appellant is still faced with the necessity of filing in the district court "a petition signed by a majority of the owners of substantial property interests in land or possessory rights in land * * *."

Again assuming that the petition had been amended, as appellant now claims should have been done, proof that 207 persons owned the land they claimed to own is not proof that there were only 207 owners. By the same token, it is not proof that a majority of all the owners had signed the petition.

In that state of the record what else could the Court have done but have "*ruled and left the bench*" (App. Br. 22) or proceeded to the next case? The record on appeal does not show what happened after the ruling.

A far more reasonable and logical conclusion from the record is that the Court realized the incidental character of these matters, and knew that whether the petition was amended or not, unless the 1947 amendment meant that registered owners were all the owners, appellant could not prevail on the theory it adopted in trying the case as well as in resisting the motion for nonsuit or dismissal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court of the Territory of Alaska, Fourth Judicial Division, should be affirmed.

Dated: April 5, 1950.

Respectfully submitted,

SOUTHALL R. PFUND,

Attorney for Appellee

*United States Smelting Refining and
Mining Company.*

PILLSBURY, MADISON & SUTRO,

ALLAN R. MOLTZEN,

Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

§ 16-1-22. *Petition, hearing and order for election: Persons presumed owners of property.* Whenever the council of any city shall desire to enlarge the limits of said city by annexing the territory contiguous thereto, they shall file in the district court for the judicial division wherein the city is located, a petition signed by a majority of the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tideland within the limits of the territory so proposed to be annexed, setting forth by metes and bounds the territory sought to be annexed to such city, and there shall be attached thereto a plat based upon an actual survey by a competent surveyor setting forth the limits and boundaries of the territory to be annexed by metes and bounds and stating the number of inhabitants therein, as well as the number of owners of property therein situate and such other facts as the court may require. Said petition shall be sworn to on behalf of the city and by at least one of the property owners herein provided for. Said petition may be presented in open court or to the judge of said court in chambers and said judge shall fix a time and place of hearing on the petition and shall cause notice of said hearing to be posted in at least three of the most public places in such city and in three places within the territory sought to be annexed, and if a newspaper be published in said city, then to publish such notice at least three times in such paper. Such notices shall be posted at least four weeks before the hearing

and the first publication of such notice in the newspaper shall be at least four weeks before the hearing. The court shall make diligent inquiry as to the reasonableness and justice of the petition and if the court be satisfied from proofs and evidence that no private rights will be injured by granting the petition and if it is just and reasonable that the annexation take place, the court shall, unless it be shown that the petition is not bona fide or that one or more of the signers thereto are not owners of substantial property rights as herein provided or fails to comply with the requirements of this act in any other respect, order an election.

Those owners of land within the limits of the territory sought to be annexed who have filed a statement of their ownership in the United States General Land Office for the District in which the land is situate, in compliance with Chapter 49 of the Session Laws of Alaska, 1945 [§ § 22-2-1—22-2-18 herein], shall be presumed to be the owners of substantial property interests in land or possessory rights in land, tidelands or improvements upon land or tidelands within the limits of the territory proposed and sought to be annexed in the absence of a clear showing to the contrary. [L. 1923, ch 97, § 51, p 215; CLA 1933, § 2419; am L 1947, ch 50, § 1, p 119, effective March 20, 1947.] (A.C.L.A., 1949, sec. 16-1-22)

§ 22-2-1.—*Duty of owner or transferee to file statement: Exemptions: Penalty: Lien.* It shall be the duty of each owner of land, other than of land to which the United States, or an agency or instrumentality thereof holds title, or which is owned by the Territory or a subdivision,

agency or instrumentality thereof, or by an Indian Nation, tribe, band or a member thereof, or is located within an incorporated town, to file in the United States Land Office for the District in which the land is situated, on or before June 30, 1946, a sworn statement, or a statement signed by two witnesses when it is impossible to obtain a sworn statement, giving his name, his post office address, a description of the tract of land, its acreage, use, character, and any other information necessary for the purposes of this Act. Upon a transfer of title to a tract of land on or after January 1 of any year, a statement in the form required by this section must be filed by the owner of such newly acquired tract of land on or before December 31 of that year, unless such owner is within one of the classes exempted by this section from filing such a statement. The owner of a tract of land who has made a proper return as to such land in any year, as prescribed by this section, need not thereafter file a statement under this section. Upon failure to file a statement, as required by this section, the owner shall be subject to a penalty of \$5 which shall be a lien against the land as of January 1 of the ensuing year and subject to collection as hereinafter provided. [L 1945, ch 49, § 1, p 112.] (A.C.L.A., 1949, sec. 22-2-1)

No. 12,348

IN THE

United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,

Appellees.

APPELLANT'S REPLY BRIEF.

COLLINS & CLASBY,

CHAS. J. CLASBY,

540 Second Avenue, Fairbanks, Alaska,

Attorneys for Appellant.

FILED

MAY 3 - 1950

PAUL P. O'BRIEN,

CLERK



No. 12,348

IN THE

United States Court of Appeals
For the Ninth Circuit

TOWN OF FAIRBANKS, ALASKA (a Municipal Corporation),

Appellant,

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, INC., and
CHARLES SLATER,

Appellees.

APPELLANT'S REPLY BRIEF.

This brief is submitted as a reply to the briefs filed by appellee United States Smelting Refining and Mining Company, and appellee Charles Slater.

As I understand the briefs of appellees they concede that all of the points made in our opening brief are correct, excepting that they believe that the 1947 amendment (A.C.L.A. 16-1-22 last paragraph) cannot be considered to create a presumption in aid of determining a majority for want of inclusion of the word "all", so that the statute would read,

"Those owners of land * * * who have filed a statement of their ownership * * * shall be presumed to

be *all* the owners of substantial property interest * * *

and they concede that if the word "all" was in the statute the ruling of the lower Court was error. (U.S.S.R.&M. Br. 9 and 15.)

It would therefore appear that the only issue is whether the amendment creates a presumption as to the *census of owners* in the area. We fail to see how the inclusion of the word "all" can add to the clear language of the statute creating just that effect. Certainly, "*Those persons * * * shall be presumed to be the persons * * **" is as clear an expression as written language will permit. Appellees will have the Court believe that the statute is limited to creating a presumption only that a particular registrant is an owner, If such had been the sole purpose of the legislature the statute would have been written, "Each person * * * who shall have filed a statement * * * shall be presumed to be an owner * * *."

Under the language of the statute a "census" presumption is inescapable. If "Those persons * * * who have filed * * * shall be presumed to be the owners * * * in the absence of a clear showing to the contrary * * *" (and it is admitted that such a registration creates a presumption as to *each registrant*), how can we escape the fact that the total registration is *just as effective* in creating a presumption as to the census of all owners?

To contend that the statute places a mandatory burden on appellant to prove the total, or census of all

owners, or suffer a failure of proof, is to beg the question. The issue is *majority*. The census figure, so that it shows a majority, is the subject in contention, ascertainable only from the Court's final decision. All the amendment does is shift the burden of going forward.

Appellees blandly suggest the "ease" of establishing the census! They say, *Appellant could have examined the lot and block books to determine the ownership of land not covered by registration statements.*" How utterly ridiculous! They well know such a record is non-existent. They also well know that there is no regulation of subdivisions, or of plats, that all such are an unintegrated miscellaneous mess of "sketches" as often as not prepared by the owner himself, with generally no reference points. That it is impossible to accurately map each separate plat without the aid of deeds as well as plats; and that the only source of *census* other than the Registration Act is the deeds themselves, all filed in chronological order of recordation and covering an area perhaps half the size of the State of Washington! They also know that the deed record is the only public record. To suggest that the escrow envelopes in banks and private law offices are accessible as *public records* is to show a naive conception of the reticence of banks and attorneys.

While we concede that a discussion of the prior annexation *case* is to note matters beyond the record in this case, and perhaps not proper; yet if comment thereon aids this Court in understanding the legislative intent of the amendment, such would appear fitting. But such comment should be fair. How is the

Court's ruling in the prior case applicable to one owner, but inapplicable to the whole?

One must most meticulously plat the entire area to determine the number of parcels subject to the possibility of different ownerships. This (under the old act) is the subject of evidence and must be determined as certainly as possible. Then one must, by last record owner search, house to house inquiry as to persons in possession, and other inquiry, determine who *owns each parcel*. The individual owners, the husband and wife owners, the co-owners, the partnership and corporate owners. And with reference to *each parcel* the proof must be assembled to the extent indicated requisite by the Court for each owner; *for how else can one count noses and prove the entire number?* Also, under the old act one must count contract purchases, lessees, and perhaps mortgagees, none of whom, except the later, bother to file their agreements. Is it any wonder that the legislature wished to render this vast uncertainty definite by reference to a record presumptively correct?

Counsel states in his brief (U.S.S.R.&M. 9 and 10):

"It is clear from the statement that the district court in the earlier proceeding was considering the method of proving the claims of various persons to individual parcels of land in the area sought to be annexed, *not the method of proving the total number of owners.*"

And I shall answer by asking of counsel that he evolve a method of proving the total except by establishing

the claim of each. The total is but a mechanical count—the sum of the individual claimants.

Counsel finds a significance in the repeal of the Registration Act that I am unable to understand. The petition in this case stands or falls on proof of *a majority as of the date it was filed*. The statutory presumption in aid of that petition has not been repealed. The Court's ruling at the time it was made was either right—or wrong, and if wrong must be reversed. If the legislature *removed the presumption* before a retrial, then the retrial would be had accordingly, but even that has not been done. While persons may no longer be required to register, the registrations made still exist, and it is within the province of the legislature to retain their effect on an annexation proceeding if it so desires. This is a point perhaps appellees should call to the attention of the legislature, suggesting, of course, that the *real property tax rolls* with which the legislature supplanted mere title registration, should be substituted as *prima facie* proof in an annexation proceeding, and, the appeal in this case was taken on June 15, 1949, while Chapter 106, Session Laws 1949, did not take effect until June 25, 1949.

While the Court might draw an *inference* from the fact the petition was signed by a number of persons *who had not registered their title*, thus intimating that there *may exist evidence* produceable to show the census to be greater than 207, yet upon the close of appellants case the *only actual evidence* before the

Court was that the census was 207! By what reasoning counsel deems this a failure of proof, but admits that other proof, less than 282, would be a variance is not clear.

It is respectfully submitted that the judgment of the District Court of the Territory of Alaska, Fourth Judicial Division, should be reversed.

Dated, Fairbanks, Alaska,

May 1, 1950.

Respectfully submitted,

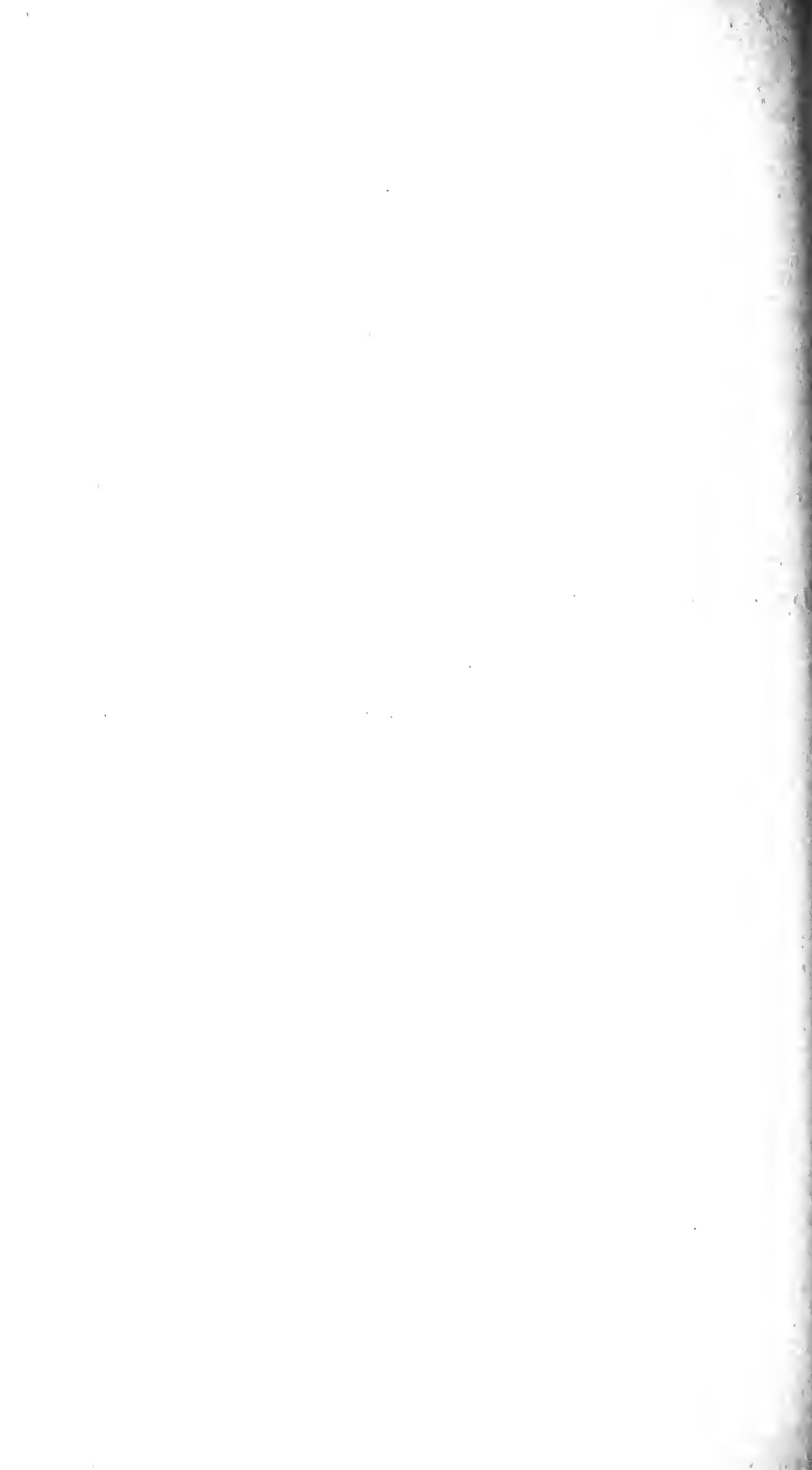
COLLINS & CLASBY,

CHAS. J. CLASBY,

Attorneys for Appellant.

Service acknowledged by receipt of copy of Reply
Brief this 27th day of April, 1950.

JULIEN A. HURLEY,
*Of Counsel for Protestant United States
Smelting Refining and Mining Com-
pany, and Charles Slater.*



No. 12,353

IN THE

United States Court of Appeals
For the Ninth Circuit

HECTOR AITCHISON and

DORIS AITCHISON,

vs.

H. G. ANDERSON,

Appellants,

Appellee.

BRIEF FOR APPELLEE.

MAURICE T. JOHNSON,

Fairbanks, Alaska,

Of Counsel for Appellee.

FILED

APR 14 1950

PAUL P. O'BRIEN,

CLERK



Subject Index

	Page
Statement of case	1
Facts	1
Argument	5
Conclusion	17

Table of Authorities Cited

Cases	Pages
Bates v. American Mortgage Co. (S.C.), 16 S.E. 883, 21 L.R.A. 340	17
Bianchi v. Denholm & McK. Co. (Mass.), 19 N.E. (2d) 697, 121 A.L.R. 460	17
Burke v. Kennedy (Pa.), 133 A. 508.....	17
Cabble v. Cabble, 97 N.Y.S. 773, 111 App. Div. 426.....	6
Catlett v. Chestnut (Fla.), 146 So. 241, 91 A.L.R. 212.....	17
Collins et al. v. Finley (C.C.A. 9), 65 F. (2d) 625.....	12
Clements v. Coppin (C.C.A. 9), 61 F. (2d) 552.....	12
Corbett v. McClintic-Marshall Corp. (Del.), 151 A. 218.....	6
Elhard v. Rott (N.D.), 162 N.W. 302.....	6
Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 N.E. 21, 53 A.L.R. 1486.....	16
Columbia Graphophone Co. v. Searchlight Horn Co. (C.C.A. 9), 236 F. 135	11
Graff v. Town of Seward, Alaska (C.C.A. 9), 20 F. (2d) 816	11
Gurley v. Woodbury (N.C.), 97 S.E. 754.....	7
Idaho Min. & Mill. Co. v. Davis (C.C.A. 9), 123 F. 396.....	11
Ironside v. Ironside (Okla.), 108 P. (2d) 157, 134 A.L.R. 621	17
Jenneman v. Bucher (Mo.), 171 S.W. 613.....	7
Lane v. Barnard, 173 N.Y.S. 714, 185 App. Div. 754.....	7
Main Realty Co. v. Blackstone Valley Gas & E. Co. (R.I.), 193 A. 879, 112 A.L.R. 744.....	16
McCullough v. Penn Mutual Life Ins. Co. of Phila. (C.C.A. 9), 62 F. (2d) 831	12
Mills v. Rich (Mich.), 229 N.W. 462.....	6
Pacific American Fisheries v. Hoff (C.C.A. 9), 291 F. 306...	11
People v. Coleman (N.Y.), 14 N.E. 431.....	6
People v. Strause (Ill.), 125 N.E. 339, 22 A.L.R. 235.....	17
Presidio Min. Co. v. Overton (C.C.A. 9), 270 F. 388.....	11

TABLE OF AUTHORITIES CITED

iii

Pages

Sherman et al. v. Bramham et ux. (C.C.A. 4), 78 F. (2d) 443	12
Southwestern Light and Power Company v. Oklahoma Tax Commission (Okla.), 62 Pac. (2d) 637.....	7
State v. Lintner (Kans.), 41 Pac. (2d) 1036.....	7
U. S., etc. v. McGowan (C.C.A. 9), 62 F. (2d) 955.....	12
Vineyard L. & S. Co. et al. v. Twin Falls Oakley L. & W. Co. (C.C.A. 9), 245 F. 30.....	11
Wineinger v. Kay (Texas), 58 S.W. (2d) 876.....	7, 10

Statutes

Alaska Compiled Laws Annotated, 1949, Volume 3, pages 2039 and 2040, Section 58-2-2, paragraph 5.....	14
---	----

Texts

53 Am. Jur. 780	16, 17
58 Am. Jur. 491	17
58 Am. Jur. 493	17
11 C.J.S., page 521	6

THE
LIBRARY
OF THE
MUSEUM OF
ART AND
ARCHAEOLOGY
OF THE
UNIVERSITY OF
CAMBRIDGE

100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200

201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300

301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400

401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HECTOR AITCHISON and

DORIS AITCHISON,

Appellants,

vs.

H. G. ANDERSON,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

Facts.

The above-entitled cause, which was a suit to dissolve a partnership and for an accounting, came on for trial on the merits before the Honorable Harry E. Pratt, District Judge for the Territory of Alaska, Fourth Judicial Division, at Fairbanks, Alaska, sitting without a jury. On the trial of said cause, the appellee above named was the plaintiff and the appellants above named were the defendants.

On or about the 13th day of June, 1947, the appellee purchased of the appellants an undivided one-half interest in the business of the appellants conducted in Fairbanks, Alaska, known as 'The Value Shop and

Liquor Store, for the sum of \$7,500.00, upon the representation of the appellants that the said sum of money represented one-half of the value thereof. Thereafter the appellee and the appellants entered into an oral contract of partnership, agreeing to conduct in Fairbanks, the business of merchandising liquor, clothing and sundry merchandise at retail under the firm name of The Value Shop and Liquor Store, one-half of the property and profits subject to one-half of the loss, to be appellee's, and the remaining one-half of the profits, subject to one-half of the loss, to be the joint property of the appellants. It was further agreed that the appellants have the entire management and control of said business, and devote their entire time and attention thereto, and as a consideration of said service, they were to draw a salary of \$500.00 per month, to be an expense in computing profits as between the partners. No term for this partnership was agreed upon. At all times between the 13th day of June, 1947, and the 1st day of September, 1948, both days included, all of the properties of said partnership had been in the exclusive control of the appellants. That from the 13th day of June, 1947, to the 1st day of September, 1948, the books and records of said partnership show sales of \$110,082.92 and show a loss of \$3,738.48 over said period of time. A shortage of between five and eight thousand dollars in the inventory of liquor appeared in the records of the co-partnership, on or about the 17th or 18th days of October, 1947, and that said shortage appeared to be traceable to the appellants. That the parties to this action all

agreed that if the appellee would waive his claim against the appellants for the shortage, that appellee, in turn, should be given credit on the books of the partnership to his capital account for a capital asset of \$2,500.00 and that a similar amount should be deducted from the appellants' capital account.

The written lease on the premises where the business was conducted expired the 1st day of June, 1948, and was never renewed. This lease had no renewal clause in it at all and simply expired at the end of the time provided for in the said lease. It was contended by the appellants that this lease had been renewed by an oral agreement which was never reduced to writing and the lease was given a value of \$3,834.48 in a statement prepared by Boulet and Kohler, which was an erroneous valuation since the lease had expired and had never been renewed.

Subsequently, a contract in writing was made and entered into between the appellee and the appellants in which it was agreed that the appellee would purchase the interest of the appellants at the book value, plus \$1,000.00. There was no special agreement between the parties as to what book value should mean and therefore the usual interpretation should be given to the meaning of the words "book value" which is that book value is the net value of the interest or the true net value. The book value which the appellants placed upon their interest was based upon the landed cost of the merchandise and not the actual market value of the property.

The appellee was not the party in fault in this case and should, therefore, be entitled to wind up the partnership business as provided by law.

After hearing all of the testimony and the evidence produced at the trial, and after hearing the arguments of counsel, the trial Court found for the appellee and entered findings of fact and conclusions of law therein. Subsequently, objections and exceptions to the said findings of fact and conclusions of law were filed by the appellants. These objections and exceptions were overruled after argument. Thereafter a motion for new trial was filed by the appellants, which motion for new trial came on for hearing and was denied by the trial Court, and thereupon, the said trial Court entered a judgment in accordance with the findings of fact and conclusions of law, and decreed that the appellants, and each of them, by their wrongful acts, caused a dissolution of the co-partnership firm and that said dissolution was caused solely by the fault of the appellants and that the appellee was not at fault in any way; and that the appellee was entitled to wind up the affairs of the co-partnership firm without the interference from the appellants; and that the appellants, and each of them, had breached the terms of the written contract between the parties and therefore were not entitled to any benefits therefrom; that the appellee was entitled to a credit on his capital account of \$2,500.00 and that the appellants should be charged a like sum; that the written lease had expired and that there was no lawful or enforceable lease on the premises by reason thereof, and that no value of leasehold

improvements was entitled to consideration in the windup of the affairs of the partnership business; that the book value mentioned in the agreement of September 2, 1948, was declared to be the actual value of the assets and that the contract itself, by reason of having been breached, was of no effect, and that the appellee have and recover \$500.00 for his attorney's fees and his costs in the sum of \$102.00.

It is this judgment upon which this appeal is taken.

ARGUMENT.

The first point upon which the appellants have relied for reversal of the judgment of the District Court for the Territory of Alaska, Fourth Division, is without foundation in fact or in law. The appellants contend that the Court erred in decreeing that the appellants, and each of them, had breached the terms of the written contract between the parties which was entered into on the 2nd day of September, 1948, and that by reason of said breach, are not entitled to the benefits therefrom. The appellants go so far as to set forth the agreement in its entirety in their brief.

A careful reading of the agreement discloses that no special meaning was to be given to the words "book value" except the generally accepted meaning of these words. The trial Court found that there was no special agreement between the parties as to what book value should mean and that therefore the usual interpretation was to be taken, which is that book value

means net value of the interest, and the true net value. The trial Court also found that this value was to be based upon true and correct books and not upon erroneous or false books, or entries, and in this case the books should have shown the entry in regard to the capital accounts of the partners and should not have shown any asset as to the lease on the premises and should have taken the market value of the actual property and not the landed cost value, by reason of which the appellants had failed to prove the contract which they have set forth in their brief.

In Volume 11, C.J.S., page 521, book value is defined thus: "The term implies the existence of books as the basis of computation of the items and figures therein from which the book value is derived, and also a computation that is based upon all the books. In connection with a going business, * * * the phrase has been defined as meaning the actual cost of the stock of merchandise and accounts on hand *less* such depreciation as has actually accrued;" (italics ours) also "the value ascertained by deducting from the assets, carried on the books, the liabilities and other matters required to be deducted."

Corbett v. McClintic-Marshall Corp. (Del.), 151 A. 218, 222;

Elhard v. Rott (N.D.), 162 N.W. 302;

People v. Coleman (N.Y.), 14 N.E. 431, 433;

Cable v. Cable, 97 N.Y.S. 773, 775, 111 App. Div. 426, 429.

In *Mills v. Rich* (Mich.), 229 N.W. 462, the Court said at page 463:

“The book value of a business is based upon the actual cost to the defendant of the stock of merchandise and accounts on hand less such depreciation as has actually accrued. * * * Ordinarily a stock of merchandise is worth what it will fetch in the open market.”

Gurley v. Woodbury (N.C.), 97 S.E. 754, 756;
Jenneman v. Bucher (Mo.), 171 S.W. 613, 615.

In *Lane v. Barnard*, 173 N.Y.S. 714, 716, 185 App. Div. 754, it was held that

“Book value means the value of the stock as shown by the assets and liabilities as carried on the books.”

In *State v. Lintner* (Kans.), 41 Pac. (2d) 1036, 1038, it was held

“Book value is the net worth of all assets less all liabilities.”

In *Southwestern Light and Power Company v. Oklahoma Tax Commission* (Okla.), 62 Pac. (2d) 637, 640, it was held

“Book value means the market value of assets less liabilities.”

In *Wineinger v. Kay* (Texas), 58 S.W. (2d) 876, 877, it was held

“Book value does not mean any arbitrary or fictitious value that may be entered on the books of the company, but the value as predicated on the market value of the assets of the company, after deducting its liabilities.” (Italics ours.)

It is difficult to understand how the appellants argue that the Court erred in its ruling on the definition of book value in view of the foregoing authorities. They are clear and conclusive and certainly fully substantiate the finding of the trial Court.

The appellants argue on pages 4 and 5 of their brief that immediately upon the execution of the contract, possession of the property was delivered to the appellee and that the appellants had nothing further to do with the business after that. This fact does not relieve the appellants from their full responsibility in complying with the terms of the agreement which was to sell the property to the appellee on the basis of \$1,000.00, plus book value, and as has been pointed out above, this book value means the actual value of the property and not some arbitrary or fictitious value, fixed by Boulet and Kohler or anyone else, on the books. After being in exclusive and full control of the business from June 13, 1947, to September 1, 1948, during which time the business lost money, the appellants probably were glad to try to unload it on the appellee at inflated prices, and when they did not succeed in this scheme, they suddenly attempted to rely solely upon their alleged contract dated September 2, 1948. All of the evidence substantiates and supports the trial Court's ruling that the appellants had themselves violated their own contract and that therefore they should not be permitted to rely upon its provisions.

The Court did not err in decreeing that the book value, mentioned in the agreement of September 2,

1948, between the parties, was the actual value of the assets of the co-partnership business, or that the appellants breached the contract by having Boulet and Kohler establish book value as actual value, or that the contract is of no effect, because the law contained in the cases cited above amply supports the rule that book value means actual value; and that Boulet and Kohler did not use actual value in computing the book value, because Mr. Boulet of that firm testified that the basis used by them in arriving at the book value was *the landed cost of the merchandise* (italics ours), and that the landed cost figure was given to Boulet and Kohler by the appellants who had priced the inventory, and that the landed cost was the only basis used by them in arriving at the book value. (T.R. Volume one, page 104.) As a matter of fact, the evidence clearly discloses that a great deal of the goods listed in the inventory was old, obsolete and shopworn, and instead of being worth \$10,830.16 as fixed by the firm of Boulet and Kohler on the basis of landed cost, the said dry goods had a true value, as shown by the testimony of Leo E. Morse, of \$5,197.59. A similar situation existed in connection with the liquor inventory. Many items thereon were poor selling, unmarketable items which the partnership had been forced to purchase in order to get more popular brands of liquor, and that therefore, valuing these items on the basis of landed cost instead of actual market value would have been a very serious imposition on the appellee, to say the least.

From June 13, 1947, to September 1, 1948, the business was under the full and exclusive control of the ap-

pellants and there is nothing to show that the appellee had any particular knowledge of how the book value was shown by the books of Boulet and Kohler, and it would make no difference as to the law applicable to this case whether the appellee had such knowledge or not, because the law is well settled that book value does not mean any arbitrary or fictitious value that may be entered on the books of the company, but the value as predicated on the market value of the assets of the company. *Wineinger v. Kay*, supra.

The appellee, upon learning of the method by which the appellants sought to arrive at book value, immediately disputed it as was testified by Mr. Boulet. (T.R. Volume one, page 87.)

The appellants seek to substantiate their point by referring to appellee's Exhibit "R" as being a letter wherein the attorney for the appellee recognized the agreement to sell as binding. As is clear from the testimony and from the exhibit itself, the contract was recognized only on the basis of correct book value, including an adjustment in the capital accounts made necessary by reason of the shortage in the liquor inventory and since the offer of the appellee was rejected, as they point out in their brief, they cannot now be heard to argue that the agreement was good, and still fail to live up to any part of its provisions themselves. The appellants point out in their brief that this question was clearly presented to the trial Court in objections and exceptions to the Court's findings and that it was also called to the trial Court's attention in the motion for new trial; however, they fail to point

out that the objections and exceptions were properly argued before the trial Court, as was the motion for new trial, and the trial Court properly overruled the objections and exceptions to the findings and properly denied the motion for new trial.

Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judging of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial Court is persuasive and presumptively correct.

Presidio Min. Co. v. Overton (C.C.A. 9), 270 F. 388, 390;

Pacific American Fisheries v. Hoff (C.C.A. 9), 291 F. 306, 308.

Findings of fact made by the trial Court will be accorded great weight, and the Appellate Court will not usually disturb them, unless they are clearly erroneous, or there is a preponderance of evidence against them.

Idaho Min. & Mill. Co. v. Davis (C.C.A. 9), 123 F. 396, 397;

Columbia Graphophone Co. v. Searchlight Horn Co. (C.C.A. 9), 236 F. 135;

Vineyard L. & S. Co. et al. v. Twin Falls Oakley L. & W. Co. (C.C.A. 9), 245 F. 30, 33.

The findings of the trial Court, based on evidence taken in open Court, will not be reviewed by an Appellate Court, except for plain or obvious error.

Graff v. Town of Seward, Alaska (C.C.A. 9), 20 F. (2d) 816.

The findings of the trial Court in a suit in equity are presumptively correct and will not be disturbed unless a serious mistake of fact appears; and where there is substantial evidence to support the finding of the trial Court, it is immaterial that the Appellate Court might differ with the process of reasoning employed to reach the finding.

Sherman et al. v. Bramham et ux. (C.C.A. 4),
78 F. (2d) 443.

The findings of the trial Court, in a suit in equity, based on conflicting testimony, taken in open Court, will not be disturbed on appeal.

Clements v. Coppin (C.C.A. 9), 61 F. (2d) 552,
557;

*McCullough v. Penn Mutual Life Ins. Co. of
Phila.* (C.C.A. 9), 62 F. (2d) 831;

U. S., etc. v. McGowan (C.C.A. 9), 62 F. (2d)
955;

Collins et al. v. Finley (C.C.A. 9), 65 F. (2d)
625, 626.

In view of the foregoing authorities, it seems clear that the trial Court did not err in decreeing that the appellee was entitled to have and receive a credit to his capital account of \$2,500.00 and that the appellants be charged with the said sum of \$2,500.00. The testimony seems conclusive that there was a shortage in the liquor inventory of approximately seven to eight thousand dollars. Neither of the appellants was able to explain this shortage nor did either of the appellants deny that such a shortage existed; and yet the shortage came about during the time when the appellants had

the full and complete authority over the business and during the time when they were in full and exclusive possession and control of the business, namely, between June 13, 1947 and September 1, 1948. In fact, Mr. Hector Aitchison, one of the appellants, testified as follows on cross-examination:

“Q. Mr. Aitchison, you say that Mr. Orsini and Mr. Anderson claimed there was some discrepancy in the inventory of liquor there?

A. Yes.

Q. I believe you stated that you couldn't explain it to them, how it happened?

A. That is right.” (T.R. Volume two, page 386.)

“Q. Well, why didn't you explain to them the discrepancy of approximately \$7,000.00?

A. I am not a bookkeeper and I couldn't.” (T.R. Volume two, page 387.)

All of the testimony of the other witnesses who were present when the discussion concerning the liquor shortage was had likewise testified that the appellants did not deny the shortage and yet they could not explain it, and that the appellants positively agreed to the adjustment in capital accounts between the appellee and appellants. Inasmuch as the contract of September 2, 1948, had been violated by the appellants and therefore could not be binding on the appellee, it was perfectly proper for the parties to discuss all of the transactions and dealings had in the partnership business from the 13th day of June, 1947, down to the date of the contract, and whether or not the appellee knew that the transfer of \$2,500.00 from

appellants' capital account to his had not been made when the contract was signed is of no consequence, because the parties had agreed to this transfer on October 17th or 18th, of 1947, and that it was merely a matter of having the bookkeepers make the entry on the company ledger.

The trial Court did not err in decreeing that the written lease existing between the co-partnership firm and the Mike Stepovich Estate had never been renewed and therefore was of no value as an asset of the co-partnership firm. The evidence clearly discloses that the old lease, appellee's Exhibit "T", had no renewal clause in it at all, and that it had simply expired at the end of the term provided for in said lease. There was certain testimony concerning an oral agreement and conversation between the appellants and Mike Stepovich, Esq., concerning the properties involved; however, this understanding or arrangement for a two-year lease with the option to renew for two years, was entirely verbal and no memorandum thereof or anything else was ever reduced to writing. Consequently the matter falls within the provisions of the statute of frauds for the Territory of Alaska, Volume 3, Alaska Compiled Laws Annotated, 1949, page 2039 and 2040, Sec. 58-2-2, paragraph 5, "An agreement for leasing for a longer period than one year * * *" In view of this section of the statute, it seems clear that the matter concerning the lease falls within the provisions of the Alaska Territorial statute of frauds. Mr. Boulet testified concerning the lease and said, "However, verbal lease has been given for two years." (T.R.

Volume one, page 87.) Nowhere in the transcript is there any testimony showing anything to the contrary with reference to the lease and therefore it must be held to come within the statute of frauds, and the oral agreement to lease for two years, with an option to renew, is wholly void and of no force or effect. Consequently, the appellants wrongfully caused the bookkeepers, Boulet and Kohler, in making up the book value of the assets of said co-partnership firm, to value an alleged leasehold interest of the partnership in the premises, or on the business which was being conducted, as being of the value of \$3,834.48, whereas the co-partnership firm had no lease whatever but was merely holding on a month to month tenancy or under an oral promise of a two-year lease which is invalid under the statute of frauds of Alaska, *supra*.

The matters and things set forth in the affidavit of Doris Aitchison supporting the motion for new trial are entirely outside the issues of this case, since they occurred long after the suit was started and judgment entered therein, and were not part of the issues joined herein. As a matter of fact, the lease referred to by Doris Aitchison in her affidavit was between entirely different parties from those contained in the lease formerly held by the partnership. The lessee in the lease mentioned in said affidavit was Heber G. Anderson, liquidating partner, and said lease was obtained by the said liquidating partner long after the original partnership had been dissolved and the judgment entered authorizing the said Heber G. Anderson to liquidate the former partnership business.

It is difficult to understand by what process of reasoning the appellants argue that they should have judgment against the appellee for the sum of \$4,309.29, together with a reasonable attorney's fee in the sum of \$500.00 and their costs and disbursements in the trial Court and their costs and disbursements in the Appellate Court. There is no testimony whatever to support any such contention and all of the testimony is to the contrary and supports the theory that the judgment for the appellee rendered in the trial Court should be affirmed.

In actions which are tried before a Court, without a jury, the trial Court is entitled to consider all the evidence and to draw therefrom such inferences as are reasonable and proper under the circumstances, even though another inference, equally reasonable, might also be drawn therefrom. The weight of inferences and of the explanation offered to meet them, is for the determination of the Court, when it is the trier of the facts.

53 *Am. Jur.* 780;

Main Realty Co. v. Blackstone Valley Gas & E. Co. (R.I.), 193 A. 879, 112 A.L.R. 744;

Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 N.E. 21, 53 A.L.R. 1486.

The trial judge, in a trial to the Court without a jury, performs a dual function: he must adopt rules of law for his guidance and find the facts as guided by those rules. He is likewise the judge of the credibility to be given to witnesses who appear before

him, and he is not required to accept the testimony of any witness, which he may deem unreliable, although it may be uncontradicted.

53 *Am. Jur.* 780;

Bianchi v. Denholm & McK. Co. (Mass.), 19 N.E. (2d) 697, 121 A.L.R. 460;

58 *Am. Jur.* 491;

Bates v. American Mortgage Co. (S.C.), 16 S.E. 883, 21 L.R.A. 340.

Testimony may be unimpeached by any direct evidence to the contrary and yet be so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the Court as a trier of the facts.

58 *Am. Jur.* 493;

Catlett v. Chestnut (Fla.), 146 So. 241, 91 A.L.R. 212;

People v. Strause (Ill.), 125 N.E. 339, 22 A.L.R. 235;

Ironside v. Ironside (Okla.), 108 P. (2d) 157, 134 A.L.R. 621;

Burke v. Kennedy (Pa.), 133 A. 508.

CONCLUSION.

The appellee respectfully submits that the whole argument of the appellants is a fantastic and futile attempt to maintain a position which is entirely without foundation in law or in fact, and that by reason there-

of, the judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, entered in this cause should be affirmed.

Dated, Fairbanks, Alaska,
April 3, 1950.

Respectfully submitted,

MAURICE T. JOHNSON,

Of Counsel for Appellee.

No. 12,354

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

SAMUEL HARRISON, now known as
James Thomas Payne,

Appellee.

BRIEF FOR APPELLANT.

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,
Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

LLOYD E. GOWEN,

Assistant Adjudications Officer,

Immigration and Naturalization Service,

Post Office Building, San Francisco 1, California,

On the Brief.

FILED

DEC 2 - 1948

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Jurisdiction	1
Statement of Case	2
Summary of Facts	3
Specifications of Error	7
Argument	7
Effect of bigamous marriage as to claim of good moral character	9
Effect of perjury as to claim of good moral character.....	13
Effect of failure to provide for support of minor children as to claim of good moral character.....	15
Conclusion	15

Table of Authorities Cited

	Page
Ex parte Chin Chan On, 32 F. (2d) 829.....	14
In re Kornstein, 268 F. 173	14
In re McNeil, 14 Fed. Supp. 395	14
In re Nosen, 49 F. (2d) 817	15
In re Schlau, C.C.A. 2 Cir., June 10, 1943, 136 F. (2d) 480...	10
In re Speigel, D.C.N.Y. 1948, 24 F. (2d) 605.....	11
In re Spencer, C.C. Ore. 1878, 5 Sawy. 195, 22 Fed. Case 13234	14
In re Talarico, D.C. Pa. 1912, 197 F. 1019.....	14
In re Trum, 199 F. 362.....	14
 Petition of Axelrod, D.C.N.Y. 1938, 25 Fed. Supp. 415.....	 12
Petition of Boric, 56 Fed. Supp. 133.....	12
Petition of F., D.C.N.Y. 1947, 73 Fed. Supp. 655.....	13
Petition of Horowitz, D.C.N.Y. 1931, 48 F. (2d) 652.....	12
Tatun v. U. S., 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738....	2
The Kalfarli, 2 Cir., 277 F. 391, at page 400.....	11
 United States v. DeFrancis, 60 App. D. C. 207, 50 F. (2d) 497	 11
United States v. Forrest, 69 Fed. Supp. 389.....	12
United States v. Intrieri, 56 Fed. Supp. 375.....	11
United States v. Jakini, 69 Fed. Supp. 707.....	10
United States v. Kiehin, D.C. Mo. 1921, 276 F. 818.....	12
United States v. Mancini, D.C. Pa. 1939, 29 Fed. Supp. 44...	15
United States v. Marafioti, 43 F. Supp. 45.....	9
United States v. Norris, 300 U. S. 564, 81 L. Ed. 808, 57 S. Ct. 535	14
United States v. Rodiek, 162 F. 469.....	2
United States v. Zaltzman, D.C.N.Y. 1937, 19 Fed. Supp. 305	12
United States v. Zgrebee, 38 Fed. Supp. 127.....	11

No. 12,354

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SAMUEL HARRISON, now known as
James Thomas Payne,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

The petition of appellee for admission to citizenship under Section 701 of the Nationality Act of 1940 (8 U.S.C. 1001) was filed in the United States District Court on December 26, 1946 (R. 6).

The jurisdiction to naturalize aliens as citizens of the United States is conferred upon the District Courts of the United States by Section 301(a) of the Nationality Act of 1940 (8 U.S.C. 701(a)).

The decision of the District Court granting the petition and ordering the appellee admitted to citizenship and changing appellee's name to James Thomas Payne was entered on April 11, 1949 (R. 16). Appellee

took the oath of allegiance to the United States, thereby becoming a citizen of the United States on April 18, 1949 (R. 6, 7). Notice of appeal was filed on June 17, 1949 (R. 17); order extending time to docket until September 15, 1949 was filed on July 26, 1949 (R. 18); and transcript of record was filed in this Honorable Court on September 13, 1949.

Jurisdiction is conferred upon this Honorable Court to review the final judgments of the District Courts of the United States by Section 128 of the Judicial Code, as amended (28 U.S.C. 1291), wherein it is provided that:

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Court of the United States * * * except where direct review may be had in the Supreme Court.”

The order of the District Court in granting the petition and admitting appellee to citizenship is a final decision within the meaning of the above law.¹

STATEMENT OF THE CASE.

Appellee filed his petition to become a citizen of the United States as an honorably discharged veteran of World War II under Section 701 of the Nationality Act of 1940 (8 U.S.C. 1001) before the Clerk of the United States District Court for the Northern District of California, Southern Division, on December 26, 1946 (R. 6). On April 11, 1949, there was filed in the

¹*Tatun v. U.S.*, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738; *U.S. v. Rodiek*, 162 F. 469 (9 Cir.).

District Court of the United States for the Northern District of California, Southern Division, a list of petitions recommended to be denied, including as one of the items therein, the name of the appellee (R. 8), the reason for the recommendation of denial being "failure to establish good moral character during the period required by law". There was also filed with the Court below findings and recommendations of designated examiner, Immigration and Naturalization Service, in support of the recommendation for denial aforesaid (R. 9-15).

The petition of appellee was heard in open court on April 11, 1949, at which time the findings and recommendation of the designated examiner were considered, testimony taken and exhibits filed (R. 24-50). The District Judge signed an order admitting appellee to citizenship on April 11, 1949 (R. 16). Thereafter, on April 18, 1949, petitioner took his oath of allegiance and was admitted to citizenship (R. 6-7). Notice of appeal was thereafter filed with the Court on June 17, 1949 (R. 17).

SUMMARY OF THE FACTS.

The petitioner for citizenship in the Court below (appellee here) was born in Belfast, Ireland, on November 14, 1910. His name at birth was Samuel Harrison (R. 25). He was married in Ireland on February 2, 1935 (R. 2). His wife, Margaret, and two children, a girl, thirteen, and a boy, eleven, reside in Ireland (R. 2-3). Without the dissolution of this marriage he

went through a form of marriage ceremony with one Naomi Clark, a citizen of the United States, on October 8, 1945, at Alexandria, Louisiana (R. 27, 29, 35, 44). Appellee entered the United States on July 3, 1940 as a deserting seaman and started using the name of James Thomas Payne (R. 25). In August 1940 he obtained employment as a machine operator at the Ceco Steel Products Corporation, where he has been employed continuously since 1941 with the exception of the time spent in military service (R. 9, 37). He registered under the Selective Training and Service Act of 1940 and at that time stated his place of birth was New York, New York (R. 26). He entered the United States Army on June 26, 1942 at San Francisco, California and served therein until November 24, 1945 when he was honorably discharged (R. 3, 10, 34). He served overseas from October 12, 1942 to December 5, 1943 (R. 10, 34). It was while he was serving in the army that he entered into his last marriage. After his discharge from the army he resumed his employment at the Ceco Steel Products Corporation (R. 37). The petitioner lived with Naomi Clark in San Francisco, California. She left San Francisco on October 2, 1946 (R. 10), and subsequently secured an annulment (R. 35).

The appellee was interviewed by an officer of the United States Immigration and Naturalization Service on July 29, 1946, and revealed his true history *with the exception of his marriage in Ireland* (R. 10). On this date he maintained that his only marriage was to Naomi Clark. On September 17, 1946, before an

Immigrant Inspector of the United States Immigration and Naturalization Service he *subscribed and swore* to a general information form submitted in connection with an application for suspension of deportation made by him pursuant to the provisions of Section 19(c) of the Immigration Act of 1917, as amended (8 U.S.C. 155c) (R. 42-49). In this form he stated that he was married to Naomi Clark on October 8, 1945, that *he had not been previously married*, and that *he had no children* (R. 44). Before executing the form, the appellee had been warned by the attesting officer of the penalties for making a false statement therein (R. 48-49).

On October 14, 1946, the appellee made another sworn statement before an Immigrant Inspector of the United States Immigration and Naturalization Service. He then admitted the fact of his first marriage (R. 11, 36-37). He said that at the time of his second marriage he had not received any word from Ireland that his first marriage had been terminated, but that he had heard through a seaman, who had been in Belfast, that his wife had remarried (R. 11). He stated that he had signed a waiver by which he had permitted Naomi Clark to petition for an annulment of the marriage, and had acknowledged that he had not been capable on October 8, 1945, of entering into a valid marriage with Naomi Clark (R. 12, 31, 41). He further testified that he had claimed birth in New York in his Selective Service registration form so that he would not be deported (R. 11, 26).

On December 26, 1946, the appellee filed his petition for naturalization under the provisions of Section 701 of the Nationality Act of 1940. He alleged therein that his wife's name was Margaret, that she was residing in Ireland, that he had two children, Margaret, born October 27, 1935, and James, born September 23, 1937 who were also residing in Ireland (R. 2).

On May 1, 1947, the appellee made another sworn statement before an officer of the United States Immigration and Naturalization Service. He then testified that his marriage to Naomi Clark had been annulled (R. 11). Concerning the false statements that he had made in the form executed by him on September 17, 1946, he stated he had made them because he did not think he would ever be discovered, that he had, however, no intention of deceiving the government but that he did not want to hurt Naomi Clark by having her find out the truth. He further testified that, after he came to the United States, he did not communicate with his family in Ireland and he did not send anything to them for their support (R. 11-12). He presented two letters from which it appeared that his wife had consulted attorneys in Ireland with a view to filing a petition for divorce. He said that he had signed papers indicating that he was willing to relinquish his interest in real estate in Ireland on which there was a mortgage. He indicated that, during his absence from Ireland, his wife had lived with her mother and had received whatever income was derived from rental of the property (R. 13, 33, 39, 40).

SPECIFICATIONS OF ERROR.

(1) The District Court erred in holding and deciding that appellee had been a person of good moral character as is required by Section 342A of the Nationality Act of 1940, as amended June 1, 1948 (8 U.S.C. 724a) and Section 307(a) of said Act (8 U.S.C. 707).

(2) The District Court erred in holding and deciding that appellee was entitled to admission to United States citizenship.

(3) The District Court erred in failing to hold and decide that appellee had failed to establish that he was a person of good moral character as required by Section 324A of the Nationality Act of 1940, as amended June 1, 1948 (8 U.S.C. 724a) and Section 307(a) of said Act (8 U.S.C. 707).

(4) The District Court erred in admitting appellee to citizenship.

ARGUMENT.

Although the subject's petition for naturalization was filed under the provisions of Section 701 of the Nationality Act (8 U.S.C. 1001), his eligibility for naturalization must be determined in accordance with the provisions of Section 324A of the Nationality Act of 1940 (8 U.S.C. 724a), as provided in Section 2 of the Act of June 1, 1948 (Public Law 567, 80th Congress; Ch. 360, 2nd Sess.) Appendix, page vi (cited in legislative history footnote to 8 U.S.C.A. 1001).

Section 324A, *supra* (8 U.S.C. 724a) provides, under certain conditions, for the naturalization of persons with honorable service in the armed forces of the United States during either World War I or during a period beginning September 1, 1939, and ending on December 31, 1946. The benefits of this section extend to a person who was in the United States at the time of enlistment or induction. The case of the appellee, who was in San Francisco, California, at the time of his induction, and who served honorably in the United States Armed Forces within the specified period, therefore comes within the purview of this section. Section 324A (8 U.S.C. 724a) requires compliance in all respects with the conditions of the Nationality Act of 1940 with exceptions therein specifically set forth. There being no exception in respect to the establishment of good moral character, and subsection (4) specifically referring to a requirement that the petitioner "be a person of good moral character", the requirement of Section 307 of the Nationality Act of 1940 (8 U.S.C. 707) *supra*, as to the establishment of good moral character applies to petitions being heard under Section 324A (8 U.S.C. 724a).

In the instant case, the factors which must be considered as having a bearing upon the appellee's character are the nature of his relationship with Naomi Clark (R. 10, 11, 12, 27, 28, 30, 31, 35), the false statements made by him in the Immigration form executed on September 17, 1946 (R. 10, 28, 29, 35, 36, 37) and his failure to support his wife and minor children in Ireland (R. 12, 31, 33, 39).

EFFECT OF BIGAMOUS MARRIAGE AS TO CLAIM OF
GOOD MORAL CHARACTER.

From the appellee's testimony it appears that he knowingly entered into a bigamous marriage (R. 11, 31, 38-40). This bigamous relationship was maintained until shortly prior to October 1, 1946, when Naomi Clark left San Francisco (R. 13). The Courts have taken the view that a petitioner is guilty of misconduct that bars his naturalization if he knowingly entered into a void and bigamous marriage and continued to live in that relationship.

United States v. Marafioti, 43 F. Supp. 45, was an action to revoke naturalization. In that case the Court said:

"The facts have been stipulated. The defendant's petition for citizenship was filed on February 14, 1928 and on May 25, 1928 a certificate of citizenship was issued to him based upon said petition. In his petition the defendant alleged under oath that he was married to one Johanna Cordelia, then residing in Italy. At a preliminary examination conducted by a representative of the Immigration and Naturalization Service on the date of said petition the defendant stated under oath that he was married to the aforesaid Johanna Cordelia in Italy, in 1908, and that on the date of the examination she was residing in Italy. Sometime between the date of the petition and the date of the issuance of the certificate the defendant, while still the lawful husband of the aforesaid Johanna Cordelia, went through a marriage ceremony with another woman at Bayonne, New Jersey, and

thereafter defendant lived with that woman as husband and wife and still continues so to live with her.

“At the final hearing on his petition the defendant did not make known to the court the change in his marital status. No discussion at all as to his marital status was had at such final hearing.

“Defendant, prior to going through the marriage ceremony at Bayonne, New Jersey, had heard from acquaintances that his wife, Johanna Cordelia, in his absence, had married another man in Italy and was living with him as husband and wife, and the defendant believed such reports and thereupon considered himself free to marry.

* * * * *

“Indisputably at the time the application for naturalization was granted defendant was living in an adulterous relationship. The second marriage was contracted without even a colorable dissolution of the first.

* * * * *

“It is sufficient to sustain the complaint for the Government to prove that the certificate of naturalization was illegally procured. That, the Government has accomplished by proving that had all the facts been disclosed, one jurisdictional element, to-wit, proof of good moral character, would have been lacking.”

See also

In re Schlau, C.C.A. 2 Cir., June 10, 1943, 136 F. (2d) 480;

United States v. Jakini, 69 Fed. Supp. 707.

In another denaturalization case, the Court again commented on bigamous marriages in *United States v. Zgrebec*, 38 Fed. Supp. 127, as follows:

“(4) Defendant claims that when he told the examiner he had ‘no wife’ he thought she had secured a divorce in the old country. Of course this can be the only statement defendant could make under the circumstances. But it is well to note that when he filed his application for citizenship in 1922 it was after he had been married to the second wife and that he then takes the precaution to erase the first wife’s name. Doubtless there was some strong suspicion in his own mind that if the first wife’s name was left on the declaration of intention it might start inquiries by the Federal authorities as to just what had happened to his first wife. It might also reveal that he had been recently married to Katharine Kozkar. And no one knew better than defendant that he was then living with this woman as her husband. As was said in the case of *The Kalfarli*, 2 Cir., 277 F. 391, at page 400: ‘If a party conceals a fact that is material to a transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment may be as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated.’ See also *United States v. DeFrancis*, 60 App. D.C. 207, 50 F. 2d 497.”

See also

United States v. Intrieri, 56 Fed. Supp. 375.

In *In re Spiegel*, D.C. N.Y. 1948, 24 F. (2d) 605, the Court held that the second marriage of the peti-

tioner in that case, after a divorce granted by a rabbi recognized in Poland where the petitioner's first wife was living, being a bigamous marriage, the petitioner could not become a citizen.

In the matter of the *Petition of Horowitz*, D.C. N.Y. 1931, 48 F. (2d) 652, the Court held that an alien who contracted a bigamous marriage within five years preceding his petition for citizenship was not a "person of good moral character during such period, and precluded his admission to citizenship".

In the matter of the *Petition of Axelrod*, D.C. N.Y. 1938, 25 Fed. Supp. 415, the Court denied a petition for naturalization on the ground that the petitioner was unable to establish the required good moral character where petitioner was married to a divorced man whose first wife, who was still living, had obtained a divorce in New York on the ground of adultery, and petitioner's husband had made no application for modification of the divorce decree, since petitioner's marriage was invalid under New York law.

In *United States v. Zaltzman*, D.C. N.Y. 1937, 19 Fed. Supp. 305, a Jewish or rabbinical divorce was a nullity under the divorce laws of Ohio or New York as regards a question whether the party obtaining such divorce and thereafter remarrying, was a man of good moral character, so as to be entitled to citizenship.

See also

Petition of Boric, 56 Fed. Supp. 133;

United States v. Forrest, 69 Fed. Supp. 389.

In *United States v. Kichin*, D.C. Mo. 1921, 276 F. 818, it was held that one who made a second and bigamous marriage in 1904, which continued when he was admitted to citizenship in 1912, had not been a moral and law abiding citizen for five years before such naturalization, but was guilty of such fraud in concealing a fact which would have prevented his naturalization as to constitute ground for its cancellation.

In the matter of *Petition of F.*, D.C. N.Y. 1947, 73 Fed. Supp. 655, it was held that a petition for naturalization was denied upon petitioner's admission of an act of adultery during the period within which he was required to establish that he had been a person of good moral character.

**EFFECT OF PERJURY AS TO CLAIM OF GOOD
MORAL CHARACTER.**

The "General Information Form" (U.S. Exhibit A, R. 42) was subscribed and sworn to by the appellee before an Immigrant Inspector on September 17, 1946. Appellee was then attempting to bring his case within the provisions of Section 19(c) of the Immigration Act of February 5, 1917 (8 U.S.C. 155) *supra*, to gain suspension of deportation because of his marriage to Naomi G. Payne at Alexandria, Louisiana, on October 8, 1945. His allegation of a valid marriage to a United States citizen wife was an essential jurisdictional fact in that proceeding. He was adequately warned as to the penalty for giving a false answer to any of the questions (R. 48-49). The conclusion is

inescapable that the appellee committed perjury on the occasion referred to. This was less than three months before he filed his petition for naturalization. It further appears that appellee made the perjurious statements in the Immigration form because he believed he would not be discovered (R. 14). He attempts to excuse the incident by saying he was trying to help the girl he was married to at that particular time by not telling her of his prior marriage (R. 30).

In the case of *United States v. Norris*, 300 U.S. 564, 81 L. Ed. 808, 57 S. Ct. 535, the United States Supreme Court stated:

“The plain words of the statute (perjury statute—Criminal Code, Section 125) and public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by law.”

In *In re Spencer*, C.C. Ore. 1878, 5 Sawy. 195, 22 Fed. Case 13,234, the Court held that one who committed perjury had so far behaved as a man of bad moral character as to disqualify him for citizenship.

See also

In re Trum, 199 F. 362;

In re Kornstein, 268 F. 173;

Ex parte Chin Chan On, 32 F. (2d) 829;

In re McNeil, 14 Fed. Supp. 395.

In *In re Talarico*, D.C. Pa. 1912, 197 F. 1019, it was held that an applicant who gave false answers under oath to questions asked him by the Chief Naturaliza-

tion Examiner of the Department of Commerce and Labor could not be found to have behaved as a man of good moral character.

In *United States v. Mancini*, D.C. Pa. 1939, 29 Fed. Supp. 44, the Court held that the retraction on October 14, 1946, of perjured statements made on September 17, 1946, would not condone the original perjury.

EFFECT OF FAILURE TO PROVIDE FOR SUPPORT OF MINOR CHILDREN AS TO CLAIM OF GOOD MORAL CHARACTER.

The petitioner, after coming to the United States in 1940, did not contribute to the support of his family in Ireland. He was under a legal and moral obligation to do so. He had employment in the United States and was able to provide for their support (R. 38). It has been held that a petitioner for naturalization who failed to support his minor children was not a person of good moral character.

In re Nosen, 49 F. (2d) 817.

CONCLUSION.

The order naturalizing the appellee was erroneously granted. Since appellee failed to establish that he was a person of good moral character, as required by the Naturalization laws, he was not eligible for citizenship.

It is respectfully submitted, therefore, that the judgment and order of the District Court, admitting him to citizenship, should be reversed.

Dated, San Francisco, California,
November 25, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

Attorneys for Appellant.

LLOYD E. GOWEN,

Assistant Adjudications Officer,

Immigration and Naturalization Service,

On the Brief.

(Appendix Follows.)

Appendix.

Appendix

APPLICABLE STATUTES.

The general requirements for naturalization, particularly pertinent here as to good moral character are contained in Section 307 of the Nationality Act of 1940 (8 USC 707), which reads in part as follows:

8 USC 707—" (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) *during all the periods referred to in this subsection has been and still is a person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." * * * (Italics supplied.)

At the time of the filing of the petition (December 26, 1946), naturalization was sought under the special conditions provided in Section 701 of the Nationality Act of 1940 (8 USC 1001), which reads as follows:

8 USC 1001—"Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present

war and who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission into the United States serves honorably in such forces beyond the continental limits of the United States or has so served, may be naturalized *upon compliance with all the requirements of the naturalization laws* except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: Provided, however, That (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner *to be a person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall

be proved by affidavits, forming part of the petition, of at least two citizens of the United States, members or former members during the present war of the military or naval forces of the noncommissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) *the petition shall be filed not later than December 31, 1946*. Petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service." (Italics supplied.)

It will be noted that this Section of the Nationality Act required that a petition shall be filed not later than December 31, 1946. Subsequent to the expiration of the above-cited law, and on June 1, 1948 (Public Law 567, 80th Congress; Ch. 360, 2nd Sess.), the Nationality Act of 1940 was amended by the inclusion therein of Section 324 A (8 USC 724a) reading as follows:

8 USC 724a—"Sec. 324 A, (a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable

conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purpose of this section.

“(b) A person filing a petition under subsection (a) of this section shall comply *in all respects with the requirements of this chapter except that*—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of sections 303 and 326 of this Act;

(2) no declaration of intention, no certificate of arrival, and no period of residence within the United States or any State shall be required;

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a *person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States;

(5) when serving in the military or naval forces of the United States, the service of the petitioner shall be proved either

(1) by affidavits forming part of the petition, of at least two citizens of the United States, members of the military or naval forces of a noncommissioned or warrant officer grade, or higher (who may be the same witness described in clause (4) of this subsection), or (2) by a duly authenticated certification from the executive department under which the petitioner is serving. Such affidavits or certifications shall state whether the petitioner has served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946;

(6) if no longer serving in the military or naval forces of the United States, the service of the petitioner shall be proved by a duly authenticated certification from the executive department under which the petitioner served, which shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was

separated from such service under honorable conditions; and

(7) notwithstanding section 324 (e) of this Act the petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the required witnesses shall have appeared before and been examined by a representative of the Service. (*Italics supplied.*)

“(c) Citizenship granted pursuant to this section may be revoked in accordance with section 338 of this Act if at any time subsequent to naturalization the person is separated from the military or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation.”

Section 2 of Public Law 567 (*supra*) reads as follows:

“Sec. 2. The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (8 U.S.C., Supp. V. sec. 1001), and which is still pending on the date of approval of this Act, shall be determined in accordance with section 324A of the Nationality Act of 1940, as added by section 1 of this Act.” (See legislative history footnote 8 USCA 1001.)

8 USC 1001 and 8 USC 724a (supra) each refer to Sections 303 and 326 of this Act (8 USC 703 and 726). Section 303 (8 USC 703) refers to racial restrictions upon naturalization and Section 326 (8 USC 726) refers to conditions under which alien enemies may be naturalized. As neither of these sections is involved in the issues here before the Court, they are not being cited in full in this appendix.

Section 19(c), Immigration Act of February 5, 1917, 8 U.S.C. 155(c) reads in part as follows:

8 USC 155(c)—“In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse * * * of such deportable alien * * *”.



No. 12,354

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

SAMUEL HARRISON, now known as
James Thomas Payne,

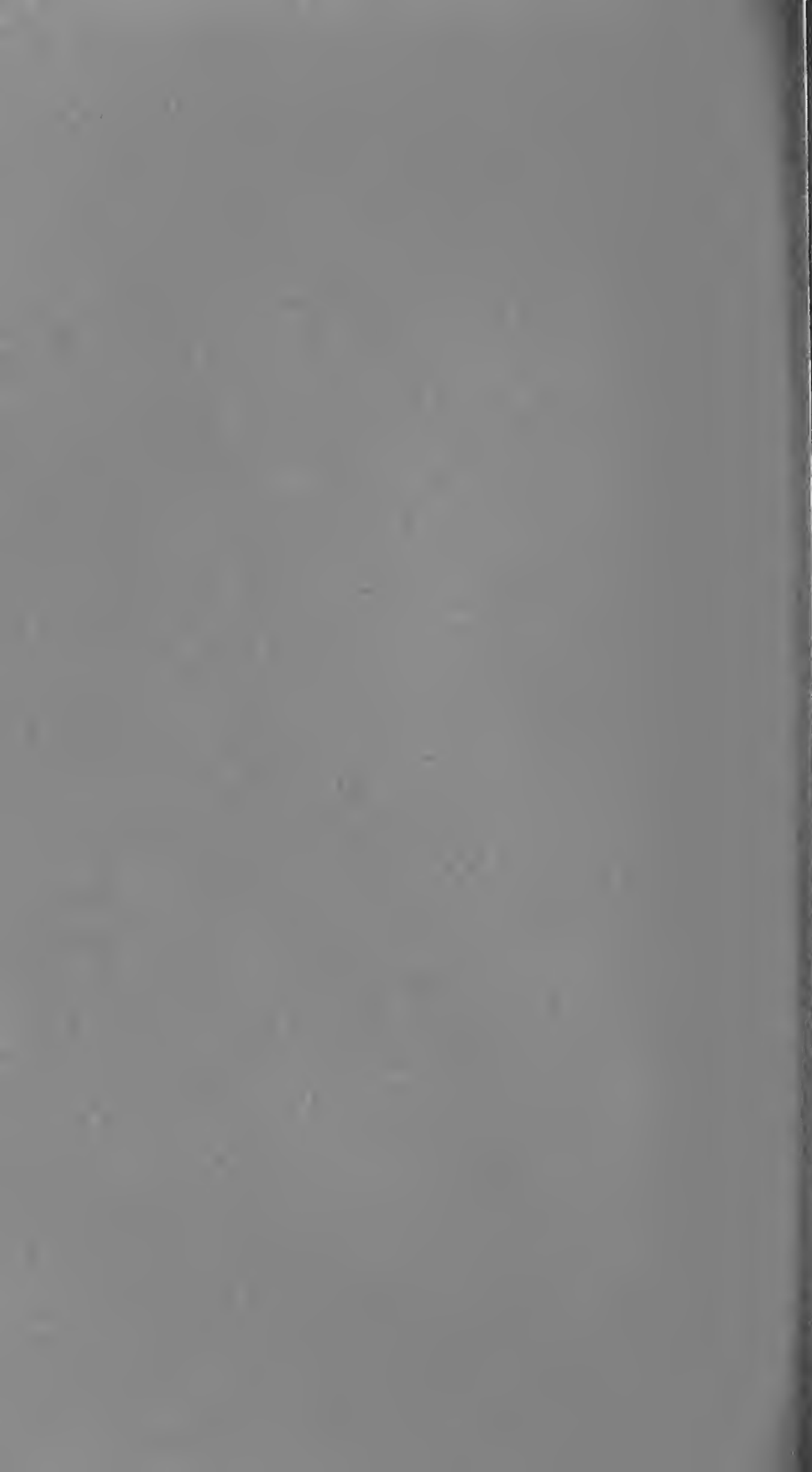
Appellee.

BRIEF FOR APPELLEE.

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,
EWING SIBBETT,

240 Montgomery Street, San Francisco 4, California,

Attorneys for Appellee.



Subject Index

	Page
Foreword	1
Contentions of the government	2
Argument	3
(1) The failure of the appellee to support his family in Ireland during the 5 year period immediately pre- ceding his petition for naturalization	5
(2) The marriage to Naomi Clark in 1945	7
(3) The false statement made by the appellee on an immi- gration form on September 17, 1946	9
Conclusion	11

Table of Authorities Cited

Cases	Pages
Daddona v. U. S., 170 Fed. (2d) 964.....	3
Estrin v. U. S., 80 Fed. (2d) 105	10
Ex parte Chin Chan On, 32 Fed. 828.....	10
In re Nosen, 49 Fed. (2d) 817	6
In re Schlau (C.C.A. 2), 136 Fed. (2d) 480.....	7, 8
In re Spencer, 22 Fed. Cases 13,234.....	10
In re Talarico, 197 Fed. 1019	10
Petitions of Rudder, 159 Fed. (2d) 695	3, 4
Petition of Schlau, 41 Fed. Supp. 161	5
Repouillie v. U. S., 165 Fed. (2d) 152	4
Schmidt v. U. S., 177 Fed. (2d) 450.....	4, 10
U. S. v. Jakini, 69 Fed. Supp. 707	7, 8
U. S. v. Mancini, 29 Fed. Supp. 44	10
U. S. v. Marafioti, 43 Fed. Supp. 45	7
U. S. v. Rubia, 110 Fed. (2d) 92.....	4, 5, 9
U. S. v. Zgrebec, 38 Fed. Supp. 127	7, 8

Statutes

Nationality Act of 1940, as amended June 1, 1948, Section 324(A) (8 U.S.C. 724(a)) and Section 307(a) (8 U.S.C. 707)	2
Nationality Act of 1940, Section 701 (8 U.S.C. 1001).....	2

No. 12,354

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

SAMUEL HARRISON, now known as
James Thomas Payne,

Appellee.

BRIEF FOR APPELLEE.

FOREWORD.

The appellee entered this country on July 3, 1940. He had been a merchant seaman for many years and had a wife and two children in Ireland. His wife and children did not accompany him and he has not seen them since. Within a month he had secured employment as a machine operator with Ceco Products Co., a San Francisco concern. He worked for that concern until he entered the military service on June 26, 1942. Appellee was seriously wounded during an air attack while serving in Alaska, and spent from 12 to 14 months in various army hospitals. (R. 35.) Upon release from the hospital he again went on active duty,

and was honorably discharged from the Army on November 24, 1945. (R. 10.) He had served overseas approximately 14 months. (R. 10.) Upon leaving the service the appellee resumed his former employment and at the time of the hearing was still employed by Ceco Products Co. A letter of commendation from the company was introduced in evidence on behalf of the appellee. (Pet. No. 1; R. 49.)

On December 26, 1946, appellee filed his petition for naturalization under the provisions of Section 701 of the Nationality Act of 1940. (8 U.S.C. 1001.) The Immigration and Naturalization Service recommended denial of the petition on the ground that the petitioner had failed to establish that he was a person of good moral character, as required by Section 324(A) of the Nationality Act of 1940, as amended June 1, 1948 (8 U.S.C. 724(a) and Section 307(a) of said Act. (8 U.S.C. 707.) The case was then heard before Honorable Herbert W. Erskine, Federal District Judge, who disapproved the recommendation of the Naturalization Service and ordered the appellee admitted to citizenship. (R. 16.)

CONTENTIONS OF THE GOVERNMENT.

The Government contends that the appellee's petition for naturalization should have been denied by the Honorable District Judge for the following reasons:

(1) Because the appellee, although he supported his family in Ireland during the first year and a half

of his stay in this country (R. 26), has failed to do so thereafter;

(2) Because the appellee entered into a bigamous marriage with one Naomi Clark in 1945; and

(3) Because four or five months prior to the filing of his naturalization petition, the appellee made a sworn statement to the United States Immigration and Naturalization Service in which he failed to reveal the fact of his first marriage in Ireland and the fact that he had two children by that marriage.

ARGUMENT.

In connection with this appeal it is important that the following general principles of naturalization law be kept in mind:

(1) Congress did not lay down any rules or tests for the determination of whether an applicant for citizenship possesses "good moral character", but left it to the discretion of the trial Court to determine this question. *Petitions of Rudder*, 159 Fed. (2d) 695, 697. The question is one to be determined from the facts of each particular case. *Daddona v. U. S.*, 170 Fed. (2d) 964, 966.

"Good moral character for the prescribed period is a question of fact. In the case at bar that fact was found in the applicant's favor * * *."

(2) The Courts have become increasingly liberal in their determinations as to whether or not applicants

for citizenship are persons of good moral character. In *Petitions of Rudder*, supra, at page 698, the Court had this to say:

“And the court decisions, following as they should the mores of the times, show an increasingly liberal trend in naturalization cases.”

In that case the evidence showed that the petitioners had been living for years in adultery. Yet because of extenuating circumstances (inability to secure divorces), the Court held the applicants to be persons of good moral character. See also the most recent Circuit Court decision on the question of “good moral character”, *Schmidt v. U. S.*, 177 Fed. (2d) 450. In that case the District Court denied citizenship because the applicant admitted to occasional acts of sexual intercourse with unmarried women. The Second Circuit Court reversed.

The modern test of whether an applicant for citizenship is a person of good moral character has been stated by the Court of Appeals for the Second Circuit in *Repouillie v. U. S.*, 165 Fed. (2d) 152, 153, to be the following:

“* * * whether the moral feelings now prevalent generally in this country would be outraged by the conduct in question * * *”

(3) An honorable discharge from the United States military service is *prima facie* evidence of good moral character. *U. S. v. Rubia*, 110 Fed. (2d) 92.

(4) The trial judge, having found in the applicant's favor on the issue of good moral character,

should not be reversed unless his decision is erroneous as a matter of law. *U. S. v. Rubia*, supra, p. 93.

(5) In determining the question of "good moral character" a distinction should be made between the commission of crimes which are *malum in se* and those which are *malum prohibitum*. (*Petition of Schlau*, 41 F. Supp. 161, 163.)

"The distinction between offenses which involve moral turpitude and those which are free of that taint is well recognized at law. That indicates that depravity of character and violation of law are not necessarily wedded together. The ancient differentiation between *malum prohibitum* and *malum in se* is a manifestation of the same common sense separation between offenses which spring from wickedness of character and those which do not."

We proceed now to a discussion of the Government's contention that the trial judge committed error as a matter of law in holding the appellee in this case to have been a person of good moral character during the five year period preceding his petition for naturalization. This contention is based on the following derelictions on the part of appellee:

- (1) **THE FAILURE OF THE APPELLEE TO SUPPORT HIS FAMILY IN IRELAND DURING THE 5 YEAR PERIOD IMMEDIATELY PRECEDING HIS PETITION FOR NATURALIZATION.**

The applicant testified in the Court below that he was a merchant seaman by avocation and had been following the sea since he was 17 years old. (R. 32.)

His wife objected to him going to sea and told him she would leave him if he didn't quit the sea. (R. 32.) He came to the United States in July of 1940, but continued to support his children for the first year and a half of his stay in this country. (R. 31.) He testified at the time he came to the United States his family was "pretty well fixed". (R. 33.) When he left, his wife went with the children to live with her parents. The wife rented out a house which she and the appellee had just about completed purchasing when he left. (R. 33.) At no time did his wife ever ask the appellee for support. (R. 39.)

In 1947 he consulted a lawyer in San Francisco with a view to obtaining a divorce from his wife and deeding to her his interest in the home. (R. 39.) His wife wrote back, through an attorney, agreeing to this, but since that time the appellee's letters have not been answered. (R. 39.)

The only case cited by the Government in support of its position that it was error for the trial judge to hold that the foregoing course of conduct did not constitute bad moral character, is *In re Nosen*, 49 Fed. (2d) 817.

That case is a District Court decision, and while it may very well have been affirmed if appealed to the Circuit Court, it seems equally clear under the cases we have cited herein, that the Circuit Court would also have affirmed a decision of the District Court in favor of the applicant Nosen. The case, therefore, is in no way controlling or even persuasive as to the case at bar.

(2) THE MARRIAGE TO NAOMI CLARK IN 1945.

The appellee testified that while he was in the army and located at a base here in the United States, he met and married a Federal civilian employee at the base by the name of Naomi Clark. (R. 35.) Prior to his marriage to Naomi Clark he had been told by a merchant seaman friend of his that he understood that his wife in Ireland had obtained a divorce. (R. 27.) This marriage was annulled one year later because of the existence of the prior marriage. (R. 35.) The appellee testified that the reason he did not tell Naomi Clark about his prior marriage was that she was ill at the time and he felt that such a disclosure would be detrimental to her health. (R. 30.)

In support of its position that the bigamous marriage in this case precludes a holding of good moral character, the Government relies on the following cases:

U. S. v. Marafioti, 43 Fed. Supp. 45;

In re Schlan (C.C.A. 2), 136 Fed. (2d) 480;

U. S. v. Jakini, 69 Fed. Supp. 707;

U. S. v. Zgrebec, 38 Fed. Supp. 127.

The *Marafioti* case is a denaturalization case and is not in point here. There the petitioner entered into a bigamous marriage between the filing of his petition and the granting thereof. He failed to reveal the bigamous marriage at the final hearing on his petition. The Court held that the naturalization certificate was illegally procured because of the petitioner's failure to reveal a material change in status at the final hearing on the petition. The case does not stand for the

proposition that a bigamous marriage necessarily precludes a finding of good moral character.

In the *Schlau* case the Circuit Court did *not* reverse the District Court's decision in favor of the applicant. It merely remanded the case for the purpose of taking additional testimony on the question of whether or not the applicant believed in good faith that his former wife was dead.

In the *Jakini* case, the record indicated that Jakini had perpetrated a fraud against the Government, i.e., the obtaining of relief money under false pretenses. Jakini was prosecuted for the fraud and the case was settled by Jakini paying back to the relief authorities the sum of \$2,000. The naturalization court held that this behavior on the part of Jakini indicated a lack of good moral character and citizenship was denied. We have no quarrel with this decision but fail to see its relevancy to the case at bar.

The *Zgrebec* case was a denaturalization case involving the fraudulent failure of the naturalized citizen to reveal at the time of his naturalization the fact that he had knowingly committed bigamy and was then living with his second wife. The case at bar involves no fraud upon the Court and therefore the *Zgrebec* and other denaturalization cases cited by the Government are not in point.

The Government cited a number of other District Court decisions involving denials of citizenship for offenses similar to those involved in the case at bar. Conceding, *arguendo*, that these decisions would all

have been affirmed had they been appealed by the applicant, it does not follow that had they gone the other way they would have been reversed by the Circuit Court.

It is quite significant that the Government in the case at bar has not cited a *single* case in its opening brief involving a Circuit Court reversal of a decision of a district judge admitting a man to citizenship.* The paucity of cases of this nature is because of the rule that the granting or denial of citizenship is within the sound discretion of the trial judge and the trial judge's decision to grant or deny citizenship, will not be set aside unless there has been a clear abuse of discretion. (*U. S. v. Rubia*, supra.)

(3) THE FALSE STATEMENT MADE BY THE APPELLEE ON AN IMMIGRATION FORM ON SEPTEMBER 17, 1946.

On September 17, 1946, the appellee, in filling out an application for suspension of deportation, stated that he had not been previously married and had no children. One month later the appellee, of his own volition, returned to the Inspector before whom he had filled out the form, and furnished the correct information. The U. S. Attorney declined to prosecute. (R. 12.)

*While the final sentence in the *Schlau* case (*supra*), page 482, reads. "Reversed and remanded", actually the Circuit Court did not reverse but merely remanded the case to the District Court for the purpose of receiving further evidence.

Here again the Government fails to cite any authorities holding that it is an abuse of discretion for a district judge to grant citizenship to a man who has in the past admittedly made a false statement to the immigration authorities. The four perjury cases cited by the Government are District Court decisions denying citizenship.* In the *Spencer* case the applicant had been convicted of perjury and spent 15 months in jail for his crime. The *Chin Chan On* case involved an alien seeking admission to this country. Admission was denied because of perjured statements under oath made to the immigration authorities and also because the alien admitted that just before coming to this country he had been living in a state of polygamy with two wives in China. The *Mancini* case is another denaturalization case involving false statements made in the naturalization petition itself. The case is not in point here. The *Talarico* case, decided 38 years ago, also involved false statements made in connection with the naturalization petition itself, a situation which obviously presents a stronger case for denial than false statements made in another connection.

It is well settled under naturalization law that in determining whether an applicant possesses good moral character extenuating circumstances alter cases. (*Estrin v. U. S.*, 80 Fed. (2d) 105; *Schmidt v. U. S.*, *supra.*) The courts recognize that acts which might

**In re Spencer*, 22 Fed. Cases 13,234;
Ex parte Chin Chan On, 32 Fed. (2d) 828;
U. S. v. Mancini, 29 F. Supp. 44;
In re Talarico, 197 Fed. 1019.

show a lack of good moral character as to one applicant would not necessarily show the same lack as to another applicant.

It was the opinion of the trial judge in the case at bar that extenuating circumstances in the case of this appellee, i.e., the fact that the appellee did support his family for some time and then sought to put legal title to the family home into his wife's name; the circumstances surrounding the marriage to Naomi Clark; the subsequent annulment of that marriage; the voluntary correction made by the appellee of the previous false statement made to the Immigration Inspector, prior to any change of position on the part of the Government; the voluntary service of the appellee in the United States Armed Forces; the serious injuries suffered by the appellee in the service of his adopted country—warranted the Court in tipping the scales in favor of the applicant.

The Government has cited no cases holding that in so deciding the trial judge committed error as a matter of law.

CONCLUSION.

We respectfully submit that the determination as to whether the appellee was a person of good moral character is a matter within the sound discretion of the trial judge and, having heard the evidence and having observed the applicant and his bearing and demeanor on the witness stand, the trial Court's decision to admit applicant to citizenship was not er-

roneous as a matter of law, and should not be reversed.

Dated, San Francisco, California,
February 1, 1950.

Respectfully submitted,

GLADSTEIN, ANDERSEN, RESNER
& SAWYER,

By EWING SIBBETT,

Attorneys for Appellee.

No. 12,354

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

SAMUEL HARRISON, now known as
James Thomas Payne,
Appellee.

REPLY BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,

EDGAR R. BONSALE,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

LLOYD E. GOWEN,
Assistant Adjudications Officer,
Immigration and Naturalization Service,
Post Office Building, San Francisco 1, California,
On the Brief.

FILED

FEB 8 - 1950

PAUL P. O'BRIEN,
CLERK

Table of Authorities Cited

Cases	Page
In re Hopp, 179 Fed. Rep. 561	2
In re Paoli (1943), 49 Fed. Supp. 129	1
 Statutes	
Penal Code:	
Section 281	2
Section 282	2
Section 283	2
Nationality Act of 1940, Section 307 (8 U.S.C. 707)	1
Naturalization Law, Act June 29, 1906, c. 3592	3
34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 475)	3

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}
vs.	
SAMUEL HARRISON, now known as James Thomas Payne,	
	<i>Appellant,</i>
	<i>Appellee.</i>

REPLY BRIEF FOR APPELLANT.

In his argument, appellee seems to stress the fact that a person guilty of bigamy may still be of good moral character within the spirit and intent of Section 307 of the Nationality Act of 1940 (8 USC 707).

Our District Court has heretofore discussed the subject of what constitutes good moral character under this section of the Nationality Act of 1940. This discussion was in the case of "*In Re Paoli*", decided March 11, 1943, 49 Fed. Supp. 129, at page 130. In this case, the Court states:

"Good moral character is an intangible, not a technical thing. It results from the acts and conduct of the individual. *It has been defined as 'such a character as measures up to the standard*

of the average citizen of the community in which applicant resides.’ In *re Hopp*, D. C., 179 Fed. 561. In *re Spenser*, Fed. Cas. No. 13,234, 22 Fed. Cas. at p. 921, the court discussed the necessary elements of good moral character under the naturalization statutes, as follows: ‘What is a “good moral character” within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. * * * Upon general principles it would seem that whatever is forbidden by the law of the land ought to be considered, for the time being, immoral, within the purview of this statute. And it may be said with good reason that a person who violates the law thereby manifests, in a greater or less degree, that he is not well disposed to the good order and happiness of the country.’ ”

The Penal Code of the State of California, Section 281 defines bigamy as follows:

“Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy.”

The exceptions in Section 282 of the Penal Code of the State of California are inapplicable. Section 283 of the California Penal Code provides:

“Bigamy is punishable by a fine not exceeding five thousand dollars and by imprisonment in the state prison not exceeding ten years.”

The District Court for the Eastern District of Wisconsin, May 28, 1910, *In re Hopp*, 179 Fed. Rep. 561,

had occasion to define what constitutes good moral character under the provisions of the Naturalization Law, Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 475), and at page 563, stated:

“A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen.”

It is therefore respectfully urged that a person committing bigamy does not meet the standard of morals of the average citizen in the State of California.

Dated, San Francisco, California,
February 8, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney,

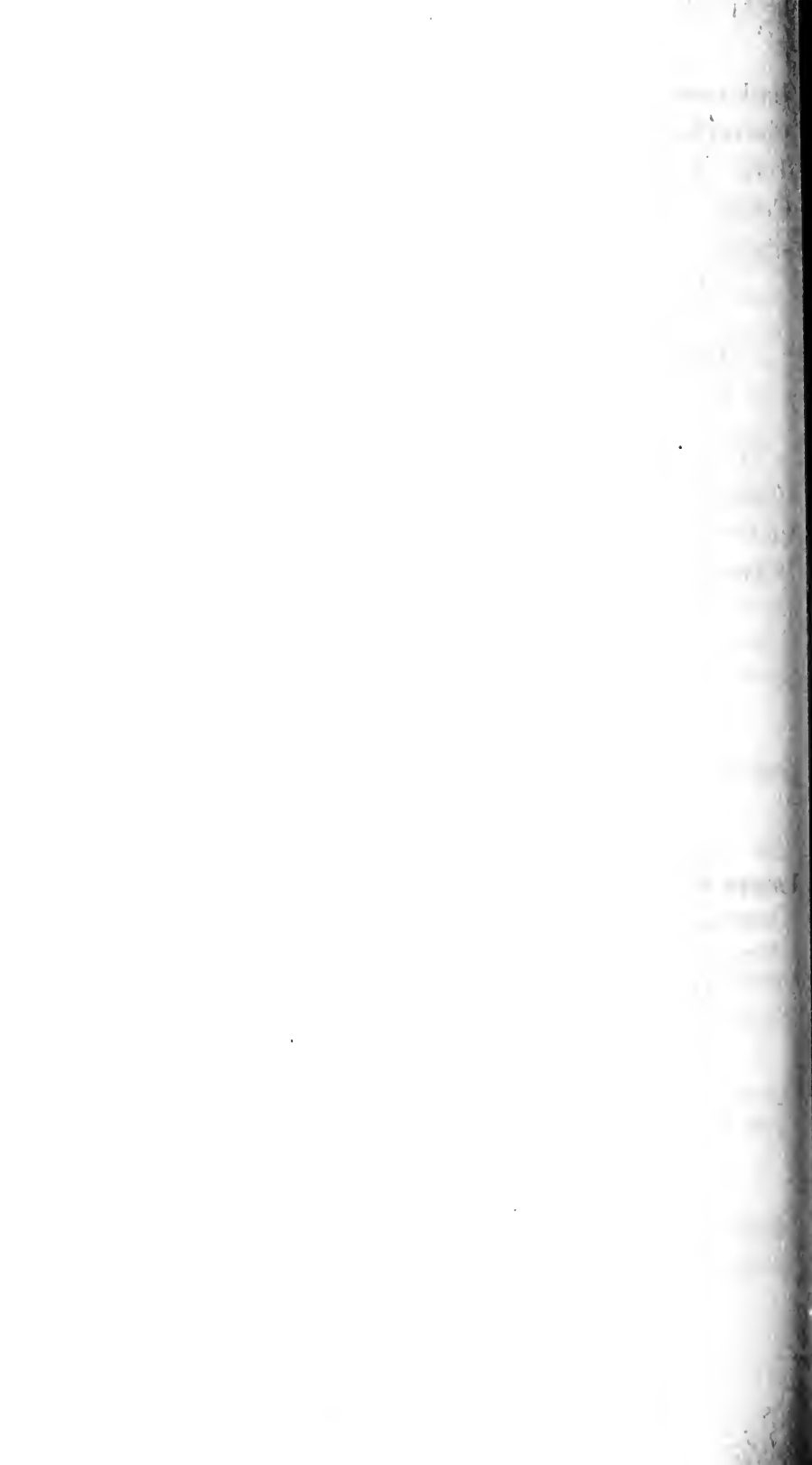
Attorneys for Appellant.

LLOYD E. GOWEN,

Assistant Adjudications Officer,

Immigration and Naturalization Service,

On the Brief.



No. 12356

United States
Court of Appeals
For the Ninth Circuit.

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,

vs.

ALPHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees of
the Nordale Estate Trust,
Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Fourth Division

FILED

DEC 22 1949

PAUL P. O'BRIEN,
CLERK

No. 12356

United States
Court of Appeals
For the Ninth Circuit.

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,
vs.

ALPHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees of
the Nordale Estate Trust,
Appellee.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
Fourth Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint.....	2
Exhibit A—Deed of Conveyance.....	6
B—Declaration of Trust.....	8
Answer to Plaintiffs' Amended Complaint....	18
Attorneys of Record.....	1
Certificate of Clerk.....	299
Counter Designation of Record.....	305
Exhibits, Plaintiffs':	
A—Trustee's Deed.....	50
B—Deed by and Between Peter Vachon and A. J. Nordale.....	55
C—Order Settling Final Account and for Distribution	60
D—Declaration of Trust.....	63
E—Deed in Trust.....	73
Designation of Record.....	45, 304

INDEX	PAGE
Findings of Fact and Conclusions of Law....	28
Conclusions of Law.....	35
Findings of Fact.....	29
Judgment	36
Motion for New Trial.....	27
Motion for an Order Extending Time to File, Record and Docket Cause.....	40
Notice of Appeal to the Ninth Circuit Court of the U. S.....	39
Opinion	21
Order Extending Time to File, Record and Docket Cause.....	41
Order in Re Filing an Amended Complaint....	17
Statement of Points.....	302
Stipulation in Re the Deposition of Fred Park- er, Sr.....	20
Stipulation in Re Exhibit F.....	41
Exhibit F—Photostatic Copy Official Plat of the Town of Fairbanks.....	44
Stipulation in Re Filing Amended Complaint..	16
Transcript of Trial.....	46

INDEX

PAGE

Witnesses, Defendants':

Birklid, William

—direct	295
—cross	297
—redirect	297

Main, Charles

—direct	291
---------------	-----

Norlin, Albert

—direct	275
—cross	279
—redirect	281

Ragle, Richard

—direct	231, 241
—by the court.....	240, 242
—cross	243
—redirect	248
—recross	252

Rothenberg, Richard

—direct	266
—cross	270
—redirect	274
—recross	274

Stanford, Davis

—direct	283
—cross	287
—redirect	290

INDEX

PAGE

Witnesses, Defendants'—(Continued):

Waxberg, A. E.

—direct	217, 254
—cross	259

Witnesses, Plaintiffs':

Engstrom, Oscar

—direct	178
—cross	182

Griffin, Reuel

—direct	201
—cross	207

Linck, Lee S.

—direct	116, 210
—cross	121
—by the court.....	125
—redirect	126

Nordale, A. H.

—direct	47, 90, 128
—by the court.....	113
—cross	130

Parker, Fred, Sr. (deposition)

—direct	146
—cross	156
—redirect	161
—recross	163

INDEX

PAGE

Witnesses, Plaintiffs'—(Continued):

Preg, Leo

—direct 185

—cross 194

Stewart, Clinton B.

—direct 82

Wehner, Adolph

—direct 164

—cross 170

Wilcox, James R.

—direct 80, 84

ATTORNEYS OF RECORD

MAURICE T. JOHNSON,

Fairbanks, Alaska,

Attorney for Plaintiffs & Appellees.

WARREN A. TAYLOR,

Fairbanks, Alaska,

BAILEY E. BELL,

Anchorage, Alaska,

Attorneys for Defendants & Appellants.

In the District Court for the Territory of Alaska,
Fourth Division

No. 5824

ALFHELD HJALMAR NORDALE and ARN-
OLD MAURITZ NORDALE, Co-trustees of
the Nordale Estate Trust,

Plaintiffs,

vs.

A. E. WAXBERG and WM. A. BIRKLID,
Defendants.

AMENDED COMPLAINT

The plaintiffs, by leave of Court first had and obtained, complain of the defendants, and for cause of action allege:

I.

That the plaintiffs are, and at all times herein mentioned have been, the owners in "Trust" of the legal title of all of Lot six (6) in Block Four (4) of the Townsite of Fairbanks, Alaska, Fairbanks Mining and Recording District, Fourth Judicial Division, Territory of Alaska, more particularly described as follows, to wit:

Beginning at Corner #1 which is also the Southeast corner of Lot 6, Block 4, as shown on the official map of the Fairbanks Townsite; Thence N. 11°16' W 308.0 feet to the present meander line on the left bank of the Chena River, Corner #2; thence downstream along the present meander line on the left bank of the Chena River to Corner #3; thence S

11°37' E 209.19 feet to Corner #4 which is also the Southwest corner of Lot 6, Block 4; thence N. 79°10' E 106.0 feet to the point of beginning; and entitled to the possession thereof, by virtue of a Deed of Conveyance from Anna Mathilda Nordale to the plaintiffs, dated November 4, 1940, and recorded in the Recorder's Office of Fairbanks Recording Precinct, December 12, 1940, in Volume 30, of Deed Records, on page 133, as document No. 87739, a copy of which Deed is attached hereto and made a part hereof as "Exhibit A," and by virtue of accretions due to the natural action of the Chena River.

II.

That the plaintiffs are Co-Trustees of the Nordale Estate Trust by virtue of the terms of a Declaration of Trust executed on the 4th day of November, 1940, by virtue of which Declaration of Trust the plaintiffs are authorized to bring this suit for the protection of the Trust Estate property; which Declaration of Trust was filed for record in the Recorder's Office of Fairbanks Recording Precinct on December 12, 1940, in Volume 8 of Miscellaneous Records, at page 450, as document No. 87740, a copy of which Declaration of Trust is hereto attached and made a part hereof as "Exhibit B."

III.

That the plaintiffs were in possession of all of said Lot six (6) in Block Four (4) of the Townsite of Fairbanks, Alaska, as above described, from on

or about the 4th day of November, 1940, down to the 13th day of March, 1948, when the defendants on the latter date entered into possession of a portion of said land, which portion is described as follows:

Beginning at Corner Number 1, which is a point 125 feet North $11^{\circ}16'$ West of the Southeast Corner of Lot 6, Block 4 of the Townsite of Fairbanks, Alaska; thence South $78^{\circ}44'$ West, 109.26 feet to the corner Number 2; thence North $11^{\circ}37'$ West, approximately 105 feet to the present meander line on the South side of the Chena River, which point is Corner Number 3; thence upstream along the present meander line of the South side of the Chena River to Corner Number 4, which is a point at the intersection of the present South meander line of the Chena River and the East side of Lot six (6), Block 4 extended; thence South $11^{\circ}16'$ East to Corner 1 and the point of beginning, and ousted the plaintiffs therefrom, and ever since then and now the said defendants unlawfully withhold the possession of said portion of Lot six (6) in Block four (4) of the Townsite of Fairbanks, Alaska, from the plaintiffs, to the damage of the plaintiffs and the Nordale Estate Trust, in the sum of Ten thousand and no/100 (\$10,000.00) Dollars.

IV.

That the plaintiffs have demanded of the defendants the possession of said premises so unlawfully entered upon by the defendants, and served notice on the defendants not to trespass upon said premises, but that notwithstanding this, the defendants have

refused to deliver possession thereof to the plaintiffs and that said defendants still refuse so to do.

V.

That it has been necessary for the plaintiffs to employ an attorney to prosecute this suit and that they have employed an attorney for that purpose, and that, therefore, they are entitled to have and recover from the defendants the sum of Fifteen hundred and no/100 (\$1500.00) Dollars for a reasonable attorney's fee.

Wherefore, the plaintiffs pray judgment against the defendants as follows:

1. That the plaintiffs may recover possession of the premises now held by the said defendants;
2. For the sum of Ten Thousand and no/100 (\$10,000.00) Dollars damages;
3. For the sum of Fifteen hundred and no/100 (\$1500.00) Dollars attorney's fees;
4. For their costs and disbursements herein.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiffs.

United States of America, Territory of Alaska,
Fourth Judicial Division—ss.

Alfheld Hjalmar Nordale, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs in the above-named cause; that he has read the foregoing Amended Complaint; that he knows the contents thereof, and that the same is true, as he verily believes.

/s/ ALFHELD HJALMAR
NORDALE.

Subscribed and sworn to before me this 22nd day of September, 1948.

[Seal] /s/ MAURICE T. JOHNSON,

Notary Public for Alaska.

My commission expires 4/17/52.

Receipt of copy acknowledged.

EXHIBIT A

DEED OF CONVEYANCE

(Copy)

Know All Men by These Presents: That I, Anna Mathilda Nordale, of Fairbanks, Alaska, as Grantor and first party, do hereby grant, bargain, sell, assign, transfer, and set over unto Alfheld Hjalmar Nordale, of Fairbanks, Alaska, and Arnold Mauritz Nordale, of Dawson, Yukon Territory, as Grantees and Trustees, and upon the terms and conditions set forth in a certain Declaration of Trust this day executed by said Trustees, reference to which is hereby made for further particulars, all of the following described property situated in the Fairbanks Mining and Recording District, Fourth Division, Territory of Alaska, and more particularly described as follows, to wit:

1244 shares of the common capital stock of the Nordale Hotel Corporation;

Lots Four (4) and Six (6) in Block Four (4); and Lots One (1), Two (2), Three (3) and Five (5)

in Block Sixty-nine (69); and Lot Seven (7) in Block Seventy-eight (78) of the town of Fairbanks, Alaska, according to the map and plat thereof on file in the office of the City Clerk of said town of Fairbanks, Alaska, and known as the "L. S. Robe Plat"; and all buildings and improvements located thereon; and

The following described patented quartz mining claims, to wit: Hope Lode Claim, Fairbanks Claim, Keystone Claim, Kawilita Claim, a more particular description of which is set forth in the patent granted by the United States to A. J. Nordale, which said patent is recorded in Volume 19 of Deeds, at page 591 thereof, of the records of said Fairbanks Recording District; and also

That certain unpatented quartz mining claim known as the Wolf Lode Claim, which said claim is bounded on the South by said Keystone Claim and on the east by said Fairbanks Claim.

Together With, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

To Have and to Hold the same unto the said Trustees, upon the terms and conditions set forth under said Declaration of Trust hereinabove referred to.

In Witness Whereof, I have hereunto set my hand and seal on this, the 4th day of November, in the year one thousand nine hundred forty, A.D.

In the presence of:

/s/ JOHN L. McGIVEN,

/s/ DOROTHY RUSSELL,

[Seal] /s/ ANNA MATHILDA NORDALE.

United States of America,

Territory of Alaska—ss.

This Is To Certify That on this, the 4th day of November, 1940, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Anna Mathilda Nordale, known to me to be the identical individual named in and who executed the foregoing instrument, and she acknowledged to me that she did so freely and voluntarily, for the uses and purposes mentioned therein.

Witness My Hand and Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ DOROTHY RUSSELL,

Notary Public in and for the Territory of Alaska.

My commission expires: Nov. 16, 1942.

EXHIBIT B

Declaration of Trust

(Copy)

Know All Men by These Presents: That we, Alfheld Hjalmar Nordale, of Fairbanks, Alaska, and Arnold Mauritz Nordale, of Dawson, Yukon Territory, do hereby admit, certify, and declare that upon this date there has been transferred, as-

signed, and conveyed to us, as grantees and Trustees, by Anna Mathilda Nordale, of Fairbanks, Alaska, as grantor and Trustor, the following described real and personal property, situate in the Fairbanks Mining and Recording District, Fourth Division, Territory of Alaska, to-wit:

1244 shares of the common capital stock of the Nordale Hotel Corporation;

Lots Four (4) and Six (6) in Block Four (4); and Lots One (1), Two (2), Three (3), and Five (5) in Block Sixty-Nine (69); and Lot Seven (7) in Block Seventy-eight (78) of the Town of Fairbanks, Alaska, according to the map and plat thereof on file in the office of the City Clerk of said town of Fairbanks, Alaska, and known as the "L. S. Robe Plat"; and

The following described patented quartz mining claims, to-wit: Hope Lode Claim, Fairbanks Claim, Keystone Claim, Kawilita Claim, a more particular description of which is set forth in the patent granted by the United States to A. J. Nordale, which said patent is recorded in Volume 19 of Deeds, at page 591 thereof, of the records of said Fairbanks Recording District; and also

That certain unpatented quartz mining claim known as the Wolf Lode Claim, which said claim is bounded on the south by said Keystone Claim and on the east by said Fairbanks Claim.

The conveyance and transfer of said property has been accepted by us as trustees, and we hereby declare and agree that we will hold said property, and

all other funds and property at any time transferred to and received by us, in trust hereunder for the following named persons and upon the following terms and conditions, to-wit:

(1) In Trust, during the life of Anna Mathilda Nordale, herein known as the Trustor, for her sole and exclusive use and benefit, and it is an express condition and provision of this trust, that, during the life of said Trustor, she shall have the right and shall be allowed to continue in the full, free, and undisturbed possession of the trust estate—save and except said stock of the Nordale Hotel Corporation and of the mining claims hereinabove described—without any rental or accounting for the rents or issues derived therefrom to said Trustees, or to any of the beneficiaries under this trust.

(2) In Trust—upon the death of said Trustor—and for the sole use and benefit of the following named persons, to-wit:

Alfheld Hjalmar Nordale, of Fairbanks, Alaska; Arnold Mauritz Nordale, of Dawson, Yukon Territory; Anita Mildred Cox, of Tiburon, California; Katherine Driscoll Nordale, of Fairbanks, Alaska; Adler Jennings Nordale, of Fairbanks, Alaska, and Alice Dolores Coney, of Fairbanks, Alaska, said above named persons being trust beneficiaries only, and their respective beneficial interest in said trust estate is as follows:

Alfheld Hjalmar Nordale, an undivided $\frac{5}{15}$ interest; Arnold Mauritz Nordale, an undivided $\frac{2}{15}$ interest; Anita Mildred Cox, an undivided $\frac{2}{15}$ in-

terest; Katherine Driscoll Nordale, an undivided 2/15 interest; Adler Jennings Nordale, an undivided 2/15 interest, and Alice Dolores Couey, an undivided 2/15 interest.

(3) In Trust—save and except as provided in paragraph (1) hereof—to collect and receive all rents and incomes from said property, and semi-annually, or oftener, at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to the Trustor or the said beneficiaries, as hereinabove provided, according to their respective interest; and, in this connection, the Trustees shall have full authority from time to time to use any funds on hand, whether received as capital or income, for the purposes of any repair, improvement, protection, or development of the properties held hereunder (save and except that the said Trustees herein shall not engage in or carry on, except as lessors, any mining operations), or the acquisition of any property as to the Trustees may be determined to be wise and expedient, for the protection and development of the trust property as a whole, pending its conversion and distribution. The determination of the Trustees, made in good faith as to all questions as between “capital” and “income,” shall be final.

(4) In Trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having for such purposes all and as full discretionary power and authority as

they would have if they were themselves the sole and exclusive beneficial owners thereof, including the right to vote said stock of the Nordale Hotel Corporation as in their judgment may seem most advisable.

(5) In Trust, pending final conversion and distribution, by and with the consent, in writing, of a majority in interest of the beneficiaries, to sell, lease, bond, mortgage, and exchange any of the property belonging to the trust; and, in addition to the power and authority conferred upon the Trustees by paragraph (3) hereof, to repair, improve, protect, and develop the property of the trust out of funds in the hands of the Trustees, the Trustees may, by and with the consent in writing of a majority in interest of the beneficiaries, borrow money to make repairs, and improvements, and to develop and acquire other properties which they deem essential and beneficial to the trust; and for said purposes the Trustees may fix the time of any loan and may pledge and mortgage any of the properties of the trust as security therefor, as they deem advisable.

(6) The Trustees may employ all such agents and attorneys as they may think proper, and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors, or omissions of such agents or attorneys employed and retained, with reasonable care.

(7) The Trustees shall at all times keep full and

proper books of account and records of their proceedings and business and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability, except for the result of his own gross negligence or bad faith.

(8) The Trustees shall be entitled to receive reasonable compensation for services, not exceeding one per cent. (1%) of the total gross annual income received by them as such Trustees; unless, hereafter, a majority in interest of the beneficiaries shall consent in writing to some larger compensation. The Trustees shall also be entitled to reimbursement and indemnification for all proper expenses, and shall be entitled at all times to the advice of counsel.

(9) Any Trustee hereunder may resign by a written instrument, duly acknowledged, and attached to the original of this instrument or recorded with the Recorder of the Fairbanks Recording District of Alaska. Any vacancy in the office of Trustee, however occasioned, shall be filled by the remaining Trustee by an instrument in writing, signed by him, and assented to in writing by the holders of a majority in interest of the beneficiaries. Such appointment to be in like manner attached to the original of this instrument or recorded in said Recording District, as in the case of the resignation last above provided for.

(10) In the event of the absence from the Territory of Alaska of either of the Trustees here-

under, or in the event that either of said Trustees is incapacitated, through illness or otherwise, from performing his duty as Trustee, then the other Trustee shall, at such time or times, have and may exercise any and all the powers given to the Trustees hereunder, with like effect as if similarly exercised by both of them.

(11) The terms and provisions of this trust may be modified at any time by instruments in writing signed and sealed and acknowledged by the then Trustees, and assented to in writing, by the holder or holders of the majority in interest of the beneficiaries, attached to the original of this instrument or recorded with the Recorder of said Fairbanks Recording District.

(12) The certificate in writing of the Trustee as to any resignation from the office of Trustee hereunder and as to the appointment of any new Trustee hereunder, and as to the existence or non-existence of any modification hereof, may always be relied upon and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees and relying upon such certificate.

(13) The title for this trust (fixed for convenience) shall be "Nordale Estate Trust", and the term "Trustees" in this instrument shall be deemed to include the original and all successive Trustees.

(14) The life of this trust shall continue for a period of twenty (20) years after the death of the Trustor, Anna Mathilda Nordale, but said Trustees, by and with the consent of a majority in interest of

the beneficiaries, may convert said estate into money and distribute any proceeds thereof among the beneficiaries entitled thereto at any time within said period of twenty (20) years, until the estate herein or the property hereunder is fully converted and distributed to the beneficiaries; and the respective interests of the beneficiaries hereunder, for the purposes of transmission and otherwise, shall be deemed personal property.

At the end of twenty (20) years from and after the death of said Trustor (unless the estate shall sooner be converted and distributed and said trust lawfully terminated), all property of every kind then held hereunder shall be sold by the Trustees, and equitable distribution made by them of the net proceeds among the persons then entitled thereto, unless the majority in interest of the beneficiaries shall elect to extend the life of this trust beyond that period.

In Witness Whereof, the said Trustees have hereunto set their hands and seals in triplicate on this 4th day of November, in the year one thousand nine hundred forty, A.D.

[Seal] /s/ ALFHELD HJALMAR
 NORDALE, Trustee.

[Seal] /s/ ARNOLD MAURITZ
NORDALE.

In the presence of:

/s/ J. L. BLOCKHUS.

/s/ DOROTHY RUSSELL.

/s/ A. F. DAILY,

/s/ M. E. A. SEALY.

United States of America,
Territory of Alaska—ss.

This Is to Certify That on this, the 4th day of November, 1940, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Alfheld Hjalmar Nordale, personally known to me to be the identical individual named in and who executed the foregoing Declaration of Trust as Trustee thereunder, and he acknowledged to me that he did so freely and voluntarily, for the uses and purposes mentioned therein.

Witness my hand and Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ DOROTHY RUSSELL,

Notary Public in and for the
Territory of Alaska.

My Commission expires Nov. 16, 1942.

[Endorsed]: Filed and Lodged Sept. 22, 1948.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that the plaintiffs above named may have leave of Court to file their Amended Complaint herein.

Dated at Fairbanks, Alaska, this 22nd day of September, 1948.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiffs.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

[Endorsed]: Filed Sept. 22, 1948.

[Title of District Court and Cause.]

ORDER

Upon the Stipulation of the parties, by their respective attorneys, and the Court being fully advised in the premises;

It Is Hereby Ordered that the plaintiffs above named, be, and they are hereby, given leave to file their Amended Complaint herein instanter.

Done at Fairbanks, Alaska, this 22nd day of September, 1948.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

Entered Sept. 22, 1948.

[Endorsed]: Filed September 22, 1948.

[Title of District Court and Cause.]

ANSWER TO PLAINTIFFS'
AMENDED COMPLAINT

Comes now the defendants herein and for answer to Plaintiffs' Amended Complaint on file herein, admit, deny and allege as follows, to-wit:

I.

Answering Paragraph I of Plaintiffs' Amended Complaint, Defendants admit that the Plaintiffs are the owners of Lot 6 of Block 4 of the Townsite of Fairbanks, Fairbanks Precinct, Fourth Division, Territory of Alaska, but deny that the description of said lot contained in said paragraph I is a full, true and correct description of said Lot 6 of Block 4, and further deny that there are any accretions to said lot by reason of the natural action of the Chena River.

II.

Defendants admit the allegations contained in Paragraph II of Plaintiffs' Amended Complaint.

III.

Defendants admit that they entered upon the lands described in Paragraph III of Plaintiffs' Amended Complaint, but deny that they ousted the Plaintiffs therefrom, and further deny that they are unlawfully holding possession of said Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, or any part thereof, from the Plaintiffs.

IV.

Defendants admit all the allegations contained in Paragraph IV of Plaintiffs' Amended Complaint,

and allege that they are lawfully in possession of the said lands described therein.

V.

Defendants deny each and every allegation contained in paragraph V of Plaintiffs' Amended Complaint.

Wherefore, having fully answered Plaintiffs' Amended Complaint, Defendants pray that Plaintiffs take nothing by their action and that the Defendants have and recover their costs and disbursements incurred herein.

/s/ WARREN A. TAYLOR,

Attorney for Defendants.

United States of America,
Territory of Alaska—ss.

A. E. Waxberg, being first duly sworn upon oath, deposes and says: That he is one of the defendants named in the above-entitled cause; that he has read the foregoing Answer to Plaintiff's Amended Complaint, knows the contents thereof, and that the same are true as he verily believes.

/s/ A. E. WAXBERG.

Subscribed and sworn to before me this 1st day of October, 1948.

/s/ WARREN A. TAYLOR,

Notary Public in and for
Alaska.

My Commission expires August 11, 1951.

My Commission expires 8/11/51.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 4, 1948.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that the Deposition of Fred Parker, Sr., a material witness for the plaintiff in the above-entitled cause, may be taken for the reason that the said witness will be unable to attend the trial of this case, which Deposition may be taken before Mike Stepovich, Jr., a Notary Public in and for the Territory of Alaska, at 4:00 o'clock p.m. on the 29th day of September, 1948, in the office of Maurice T. Johnson, Attorney at Law, Fairbanks, Alaska; and it is further stipulated and agreed, by and between the parties, that this Deposition may be taken without notice as required by Statute, and may be taken in pursuance of the Commission issued by the Clerk of this Court.

It is further stipulated and agreed that either party, during the taking of this Deposition, does not waive the right to object to any question asked or any answer given at the time the Deposition is offered and read in evidence upon the trial of this case, and both parties reserve the right to make any and all objections when the Deposition is read in evidence at the trial.

It is further stipulated and agreed, by and between the parties, that the Deposition may be offered and read in evidence without the signature of the witness, and that the signature of said witness is specifically waived.

Dated at Fairbanks, Alaska, this 29th day of September, 1948.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiffs.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

OPINION

Maurice T. Johnson, of Fairbanks, Alaska, Attorney
for Plaintiffs.

Warren A. Taylor, of Fairbanks, Alaska, Attorney
for Defendants.

The Plaintiffs and their predecessors in interest were riparian owners of land upon the Chena River, which, in May, 1903, formed the North boundary of the Town of Fairbanks, Alaska, as well as the North boundary of Plaintiffs' lot. Between 1903 and March 13, 1948, land formed onto Plaintiffs' land along the river bank until the river was pushed Northward about two hundred feet. The Plaintiffs claim this land as theirs, as being alluvion formed by accretion from deposits of the water gradually and imperceptibly. The Defendants have taken possession of a part of said alluvion under the claim that it was formed by artificial means, to-wit, by filling in, and that therefore it was open to entry

by Defendants. This is an action in the nature of ejectment.

The evidence shows that between 1903 and 1948, there was a gradual and imperceptible deposit of silt along the river bank adjacent to Plaintiffs' lot until there was a piece of dry land between the side lines of Plaintiffs' lot extended Northward, and the new river bank approximately two hundred feet Northward from the original North boundary.

The Defendants dug three pits in the alluvion within approximately 75 feet of the original North boundary line of Plaintiffs' lot. These pits were two, four and six feet in depth respectively, and approximately six feet long by four feet wide. They showed that some tin cans and other debris were mixed in with the alluvion as it had built up. The amount of such debris was an infinitesimal percent of the amount of alluvion and there was nothing in it to show that it had had any effect upon the forming of the alluvion. The evidence clearly showed that Plaintiffs and their predecessors in interest had known nothing about the deposit of such debris, and that it had been done entirely by third persons.

By Act approved June 6, 1900, Congress, in making laws for the government of Alaska, provided that "So much of the common law as is applicable to and not inconsistent with the Constitution of the United States, or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska". 31 Stat. 552, Sec. 367; Sec. 2-1-2, Alaska Compiled Laws An-

notated, 1949. This section was amended in 1933 subjecting the common law to acts passed by the Territorial Legislature, but otherwise it remains unchanged today.

The great weight of authority is that the law respecting the acquisition of title by accretion is independent of the law respecting the title to soil covered by water. *Shively vs. Bowlby*, 152 U. S. 35.

At common law the riparian owner acquires title to additions thereto by accretion. *Oklahoma vs. Texas*, 268 U. S. 252-256; 56 Am. Jur. 892; Note 18: page 901, Sec. 490; page 895. Note 20.

Even if Defendants had shown that debris had been deposited artificially in such quantities as to increase the deposit by accretion, it would nevertheless have been immaterial as the riparian owner had no part in making the artificial deposits.

St. Clair County vs. Lovington, 23 Wallace 46-66;

Jackson vs. U. S. (C.C.A. 9th) 56 Fed. (2) 340;

Forgeus vs. Santa Cruz County (Cal.) 140 Pac. 1092;

Adams vs. Roberson (Kans.) 155 Pac. 22;

Tatum vs. St. Louis (Mo.) 28 S.W. 1002;

Frank vs. Smith (Neb.) 393 N.W. 329; 134 A.L.R. 458-468;

Re Neptune Avenue (N. Y.) 262 N. Y. S. 679;

Re Hutchinson River Parkway Extension, 14 N. Y. S. (2) 692. Affirmed 33 N.E. (2) 252;

State vs. Lakefront, etc., (Ohio) 27 N.E. (2) 485;

Gillihan vs. Cieloha (Or.) 145 Pac. 1061;

Horgan vs. Jamestown (R. I.) 80 Atl. 271;

Memphis vs. Waite (Tenn.) 52 S.W. 161;

56 Am. Jur., page 899, Note 15e; page 894, note 1.

The Defendants do not admit that the South bank of the Chena River was the boundary of the Townsite of Fairbanks, and of Plaintiffs' lot, afterwards shown by the Official Survey of L. S. Robe in 1909, and the plat thereof to be Lot 6 in Block 4, of the Fairbanks Townsite, Alaska. This map, Plaintiffs' Exhibit "F," shows the Fairbanks Townsite to be bounded by the Chena River on the East and North sides. There is a dotted meander line running from point to point on or close to the bank of the river, and the lots on said meander line are bounded by the dotted line on that one side, and solid lines on the other three sides.

The rule is quoted from 7 Wall. 287 in *Shively vs. Bowlby*, 152 U. S. 39: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of

the stream, and shows, to a demonstration, that the watercourse, and not the meander line as actually run on the land, is the boundary.”

In *Whitaker vs. McBride*, 197 U. S. 510-512, it is stated: “A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser.”

To the same effect are:

8 Am. Jur. 76;

11 C.J.S. 573, Note 79.

The water and not the meander line is the boundary. *Horne vs. Smith*, 159 U. S. 40, 42, in which the Court said: “The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meandor line, but to the water line, * * *.”

In *Mitchell vs. Smale*, 140 U. S. 406, the court held, as to a non-navigable lake, page 414: “It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary.”

In *Hilt vs. Webber*, 233 N.W. 159; 31 A.L.R. 1238, it was held that the boundary line of riparian owners along the Great Lakes is the waters’ edge, and not the meander line. The riparian owner has the right to accretion.

The witness, Fred Parker, one of Plaintiffs’ predecessors in interest, testified that he and Charles

Carroll purchased the lot in May, 1903, for a site for a saw mill; that the lot ran along the South bank of the Chena River for more than 100 feet and extended back from the river some seventy feet; that they built a slip from the top of the river bank down way below the water line so that they could pull the logs up it at extreme low water and otherwise; that there was a natural eddy in the river at the foot of the slip which made an ideal mill pond. He told of operating said saw mill for the years 1903, 1904, 1905 and perhaps 1906, and that each year the mill pond grew shallower. Other witnesses corroborated Mr. Parker, and no-one contradicted him.

It seems clear, and the Court so holds, that the Chena River was the North boundary of the lot of Plaintiffs and their predecessors in interest, and continued to be such North boundary at all times mentioned in this case.

That all of such land formed by accretion was above the normal high water mark was asserted by all the parties to this action and shown by the levels run by the surveyor, and shown on Plaintiffs' Exhibit "G." It is also shown by Defendants' Exhibit "4," a portion of a tree growing upon the river bank on the ground in controversy.

A deed from Peter Vachon to A. H. Nordale, of date July 14, 1928, Plaintiffs' Exhibit "B," expressly describes the North boundary of Plaintiffs' lot as being the Chena River.

Plaintiffs' Exhibit "A" (the Trustee's deed or

patent), executed March 1, 1922, in favor of Peter Vachon and A. H. Nordale, conveys "Lot 6, Block 4 according to the official plat and survey of said Townsite." As the official survey and plat showed the North boundary of Plaintiffs' lot to be the river as mentioned above, and the ground in controversy had been formed gradually and imperceptibly by accretion, it is the property of the Plaintiffs, and they are entitled to recover possession thereof from the Defendants.

The value of the use of said ground since March 1, 1948, is \$25.00 per month, and the Plaintiffs have been damaged in such amount and may recover the same from the Defendants in this action.

Findings of Fact, Conclusions of Law and Judgment accordingly may be drawn.

Done at Fairbanks, Alaska, this 13th day of June, 1949.

/s/ HARRY E. PRATT,
District Judge.

Served June 13, 1949.

[Endorsed]: Filed June 13, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the above-named defendants, by their attorney, Warren A. Taylor, and move this Honorable Court to set aside and vacate its verdict in

the above-entitled action and grant a new trial, for the following reasons:

I.

That the evidence is insufficient to justify the verdict and is contrary to law, to-wit: That the burden of proof was upon the plaintiffs to prove by a preponderance of the evidence that the land described in said plaintiffs' complaint was formed by accretion, and that there was a total failure of proof of the same.

II.

That the Court, in arriving at its verdict in favor of the plaintiffs, failed to take into consideration defendants' evidence that the land in question was not an accretion but was formed by the deposit of waste and debris on the shore.

Dated at Fairbanks, Alaska this 16th day of June, 1949.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Be It Remembered that this cause came on regularly for trial on the 9th and 10th days of May,

1949, at which time the said cause had theretofore been regularly set for trial, said days being regular Court days of the General May 1949 Term of the above-entitled Court. The said cause was tried before the above-entitled Court without a jury, a jury having been waived by agreement of the parties.

The said cause was heard and submitted upon the issues presented by the Amended Complaint of the Plaintiffs and the Answer of the Defendants. The Plaintiff, Alpheld Hjalmar Nordale, appeared in person and by his attorney, Maurice T. Johnson, and the Plaintiff, Arnold Mauritz Nordale, appeared by his attorney, Maurice T. Johnson. The Defendants appeared in person and by their attorney, Warren A. Taylor. The Plaintiffs and the Defendants introduced testimony and the Court having considered the proofs and evidence in said cause, and having heard the arguments of counsel and having taken the matter under advisement, and being fully advised in the premises, after consideration thereof, does hereby make and order filed and entered herein the following:

Findings of Fact

I.

The Court finds that the Plaintiffs are the owners in "Trust" of the legal title of all of Lot six (6) in Block Four (4) of the Townsite of Fairbanks, Alaska, Fairbanks Recording District, Fourth Judicial Division, Territory of Alaska, ac-

ording to the official plat and survey made by W. S. Robe, C.E., in 1909, and that Plaintiffs and their predecessors in interest have been such owners at all times since May, 1903.

II.

The Court further finds that the north boundary of said lot in May, 1903, was the south bank of the Chena River, which was also the north boundary of said Fairbanks Townsite at that time.

III.

The Court further finds that between 1903 and March 13, 1948, land formed by accretion onto the Plaintiffs' north boundary along the said bank of the Chena River, until the river was pushed northward about 200 feet; and that said accretion was formed by a gradual and imperceptible deposit by accretion of silt along said river bank adjacent to the Plaintiffs' lot during said time until there was a piece of dry land between the side lines of the Plaintiffs' lot extended northward between the original north boundary of said lot and the present bank of the Chena River. Said dry land, hereinafter called "the accretion," is more particularly described as follows, to wit:

Beginning at Corner #1, which is the original Northeast corner of Lot 6, as shown on the official plat of the Town of Fairbanks, being Plaintiffs' Exhibit "F," thence North $11^{\circ}16'$ W. 235.15 feet, more or less, to the Chena River, being Corner #2; thence downstream along the said Chena River a

distance of 143.75 feet, more or less, to Corner #3; thence South $11^{\circ}37'$ East 151.76' to Corner #4, which is also the original Northwest corner of Lot 6 in Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F", thence in an Easterly direction along the original north boundary of said Lot 6, Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F," a distance of 108.05 feet, more or less, to Corner #1, the place of beginning.

IV.

The Court further finds that the Defendants dug three pits in the accretion within approximately 75 feet of the original north boundary line of Plaintiffs' lot. These pits were two four and six feet in depth respectively, and approximately six feet long by four feet wide. They showed that some tin cans and other debris were mixed in with the accretion as it had built up. The amount of such debris was an infinitesimal percent of the amount of accretion and there was nothing in it to show that it had had any effect upon the forming of the accretion. The evidence clearly showed that Plaintiffs and their predecessors in interest had known nothing about the deposit of such debris, and that it had been done entirely by third persons.

V.

The Court further finds that the official survey of the Townsite of Fairbanks, Alaska, as shown by

Plaintiffs' Exhibit "F," shows the Fairbanks Townsite to be bounded by the Chena River on the east and north sides; and that there is a dotted meander line running from point to point on or close to the bank of the river and the lots on said meander line are bounded by the dotted line on that one side and by solid lines on the other three sides.

VI.

The Court further finds that Plaintiffs' Exhibits "A" and "B" (deeds), expressly show said river to be the north boundary of said lot as extended by accretion.

VII.

The Court further finds that the Chena River was the north boundary of the lot of the Plaintiffs and their predecessors in interest and continued to be such north boundary at all times mentioned in this case; and that all of such land formed by accretion was above the normal high water mark was asserted by all of the parties to this action and was shown by the levels run by the surveyor and shown on Plaintiffs' Exhibit "B," and also shown by Defendants' Exhibit "4," a portion of a tree growing upon the river bank upon the ground in controversy.

VIII.

The Court further finds that the Plaintiffs are Co-Trustees of the Nordale Estate Trust by virtue of the terms of a Declaration of Trust executed on the 4th day of November, 1940, by virtue of

which Declaration of Trust the Plaintiffs are authorized to bring this suit for the protection of the Trust Estate property, which Declaration of Trust was filed for record in the Recorder's Office of Fairbanks Recording Precinct on December 12, 1940, in Volume 8 of Miscellaneous Records at page 450, as document No. 87740.

IX.

The Court further finds that the Plaintiffs were in possession of all of said Lot Six (6) in Block Four (4) of the Townsite of Fairbanks, Alaska, and of said accretion as above described, from on or about the 4th day of November, 1940, down to the 13th day of March, 1948, when the Defendants on the latter date unlawfully entered into possession of a portion of said land, which portion is described as follows:

Beginning at Corner Number 1, which is a point 125 feet North $11^{\circ}16'$ West of the Southeast Corner of Lot 6, Block 4 of the Townsite of Fairbanks, Alaska; thence South $78^{\circ}44'$ West, 109.26 feet to Corner Number 2; thence North $11^{\circ}37'$ West, approximately 105 feet to the present meander line on the South side of the Chena River, which point is Corner Number 3; thence upstream along the present meander line of the South side of the Chena River to Corner Number 4, which is a point at the intersection of the present South meander line of the Chena River and the East side of Lot Six (6), Block 4 extended; thence South $11^{\circ}16'$ East to Corner 1 and the point of beginning.

And ousted the Plaintiffs therefrom, and ever since then and now the said Defendants unlawfully withhold the possession of said portion of Lot Six (6) in Block Four (4) as extended by accretion, of the Townsite of Fairbanks, Alaska, from the Plaintiffs, to the damage of the Plaintiffs and the Nordale Estate Trust in the sum of \$25.00 per month since March 13, 1948, making a total sum to date of \$375.00.

X.

The Court further finds that the Plaintiffs have demanded of the Defendants the possession of said premises so unlawfully entered upon by the Defendants, and served notice on the Defendants not to trespass upon said premises, but that notwithstanding this, the Defendants have refused to deliver possession thereof to the Plaintiffs and that said Defendants still refuse so to do.

XI.

The Court further finds that it has been necessary for the Plaintiffs to employ an attorney to prosecute this suit and that they have employed an attorney for that purpose and that therefore the Plaintiffs are entitled to have and recover from the Defendants the sum of \$400.00 which the Court finds to be a reasonable attorney's fee herein.

and

From the foregoing Findings of Fact, the Court does now make and enter the following:

Conclusions of Law

I.

That the ground in controversy in this case is the property of the Plaintiffs and that the Plaintiffs are entitled to recover the possession thereof from the Defendants.

II.

That the Plaintiffs are entitled to have and recover of and from the Defendants the sum of \$25.00 per month from the 13th day of March, 1948, as damages for the wrongful possession of property, which damages to date amount to the sum of \$375.00.

III.

That the Plaintiffs are entitled to recover of and from the Defendants the sum of \$400.00 as and for their reasonable attorney's fee and their costs and disbursements herein to be taxed by the Clerk of this Court.

IV.

Let Judgment issue in accordance herewith.

Done at Fairbanks, Alaska, this 17th day of June, 1949.

/s/ HARRY E. PRATT,
District Judge.

Entered June 17, 1949.

Receipt of copy acknowledged.

[Lodged]: June 16, 1949.

[Endorsed]: Filed June 17, 1949.

In the District Court for the Territory of Alaska,
Fourth Division

No. 5824

ALFHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees of
the Nordale Estate Trust,

Plaintiffs,

vs.

A. E. WAXBERG and WM. A. BIRKLID,
Defendants.

JUDGMENT

Be It Remembered that this cause came on regularly for trial on the 9th and 10th days of May, 1949, at which time the said cause had theretofore been regularly set for trial, said days being regular Court days of the General May 1949 Term of the above-entitled Court. The said cause was tried before the above-entitled Court without a jury, a jury having been waived by agreement of the parties.

The said cause was heard and submitted upon the issues presented by the Amended Complaint of the Plaintiffs and the Answer of the Defendants. The Plaintiff, Alfheld Hjalmar Nordale, appeared in person and by his attorney, Maurice T. Johnson, and the Plaintiff, Arnold Mauritz Nordale, appeared by his attorney, Maurice T. Johnson. The Defendants appeared in person and by their attorney, Warren A. Taylor. The Plaintiffs and the Defendants introduced testimony and the Court

having considered the proofs and evidence in said cause, and having heard the arguments of counsel and having taken the matter under advisement, and after consideration thereof, having made and ordered filed herein Findings of Fact and Conclusions of Law; and the Court being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiffs, as Co-Trustees of the Nordale Estate Trust, are declared the owners in trust of the legal title and entitled to possession of all of Lot 6, in Block 4, in the Townsite of Fairbanks, Alaska, Fairbanks Recording District, Fourth Judicial Division, Territory of Alaska, which, including the accretions thereto, is more particularly described as follows, to wit:

Beginning at Corner #1 which is also the southeast corner of Lot 6, Block 4, as shown on the official map of the Fairbanks Townsite; Thence N. $11^{\circ}16'$ W. 308.0 feet to the present left bank of the Chena River, Corner #2; thence downstream along the left bank of the Chena River to Corner #3; thence S $11^{\circ}37'$ E 209.19 feet to Corner #4 which is also the Southwest corner of Lot 6, Block 4; thence N. $79^{\circ}10'$ E 106.0 feet to the point of beginning.

It Is Further Ordered, Adjudged and Decreed that the Plaintiffs have and recover forthwith, of and from the Defendants, and each of them, the possession of a portion of said Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, now held by

said Defendants, which portion is described as follows, to-wit:

Beginning at Corner Number 1, which is a point 125 feet North 11°16' West of the Southeast Corner of Lot 6, Block 4 of the Townsite of Fairbanks, Alaska; thence South 78°44' West, 109.26 feet to Corner Number 2; thence North 11°37' West, approximately 105 feet to the present south bank of the Chena River, which point is Corner Number 3; thence upstream along the present south bank of the Chena River to Corner Number 4, which is a point at the intersection of the present south bank of the Chena River and the East side of Lot Six (6), Block 4 extended northward; thence South 11°16' East to Corner 1 and the point of beginning.

It Is Further Ordered, Adjudged and Decreed that the Plaintiffs have and recover damages of and from the Defendants in the sum of \$25.00 per month from the 13th day of March, 1948, which damages to date amount to the sum of \$375.00.

It Is Further Ordered, Adjudged and Decreed that the Plaintiffs have and recover of and from the Defendants above named the sum of \$400.00 as and for the Plaintiffs' reasonable attorney's fee and Plaintiffs' costs and disbursements herein to be taxed by the Clerk of this Court in the sum of \$400.00.

Let Execution issue therefor.

Done at Fairbanks, Alaska, this 25th day of June, 1949.

/s/ HARRY E. PRATT,
District Judge.

Receipt of copy acknowledged.

[Lodged]: June 17, 1949.

[Endorsed]: Filed and Entered June 25, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE NINTH CIR-
CUIT COURT OF THE UNITED STATES
OF AMERICA

Notice Is Hereby Given that A. E. Waxberg and Wm. A. Birkliid, the Defendants above-named, hereby appeal to the Ninth Circuit Court of Appeals of the United States of America from the Order Overruling defendants' Motion for New Trial entered in this action on the 25th day of June, 1949, and from the final judgment entered in the above-entitled action on the 25th day of June, 1949.

Dated at Fairbanks, Alaska, this 29th day of June, 1949.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

[Title of District Court and Cause.]

MOTION FOR AN ORDER EXTENDING TIME
TO FILE, RECORD AND DOCKET CAUSE

Comes now, Warren A. Taylor, the attorney for the above named appellants and moves this Honorable Court for an order extending the time for the appellants to file, record and docket this cause in appeal to the 1st day of October, 1949, upon the grounds that, due to a heavy Court docket the Court reporter, who is also the secretary for the District Judge, will be unable to transcribe her notes in time to docket the said appeal within the time prescribed by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit; and for the further reason that said Judge of the District Court for the Territory of Alaska, Fourth Division, is taking a vacation and will not be in Fairbanks until the 7th day of September, 1949, to sign the necessary order allowing appeal and citation upon appeal.

Dated at Fairbanks, Alaska, this 20th day of July, 1949.

/s/ WARREN A. TAYLOR,
Attorney for Appellants.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE,
RECORD AND DOCKET CAUSE

This matter coming on for hearing upon the Motion of Warren A. Taylor, attorney for the above named appellants, for an order extending the time in which to file, record and docket the appeal in the above entitled case, and good cause appearing therefrom;

Now, Therefore, It Is Hereby Ordered that the said time for filing, recording and docketing the said appeal in the U. S. Circuit Court of Appeals for the Ninth Circuit, be and is hereby extended to the 1st day of October, 1949.

Dated and Done at Fairbanks, Alaska, this 20th day of July, 1949.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed and Entered July 20, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated and agreed between the parties hereto that in lieu of plaintiff's Exhibit F in the above entitled cause, which is the Official Plat of the Town of Fairbanks, the photostatic copy

attached hereto of that portion of said plat showing the land in controversy shall stand in place of and be sufficient for all purposes on appeal.

/s/ MAURICE T. JOHNSON,

Attorney for Plaintiff.

/s/ WARREN A. TAYLOR,

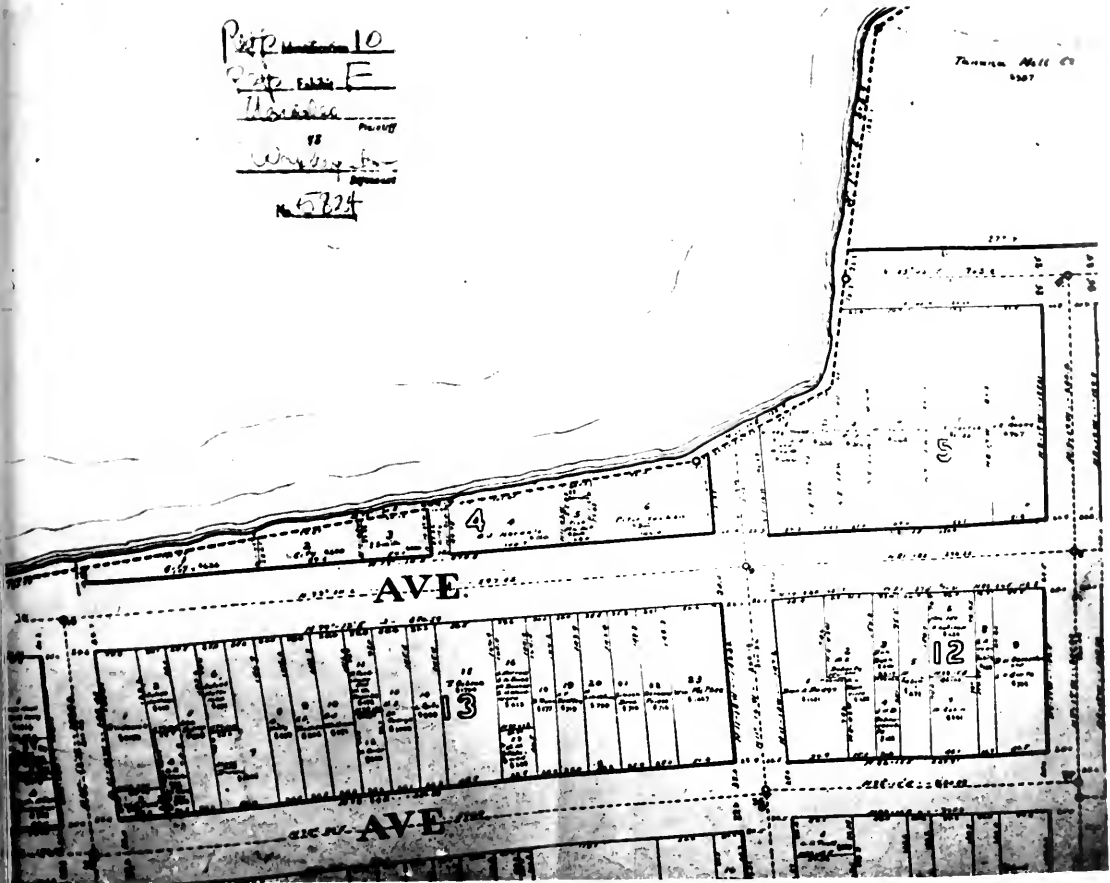
Attorney for Defendants.

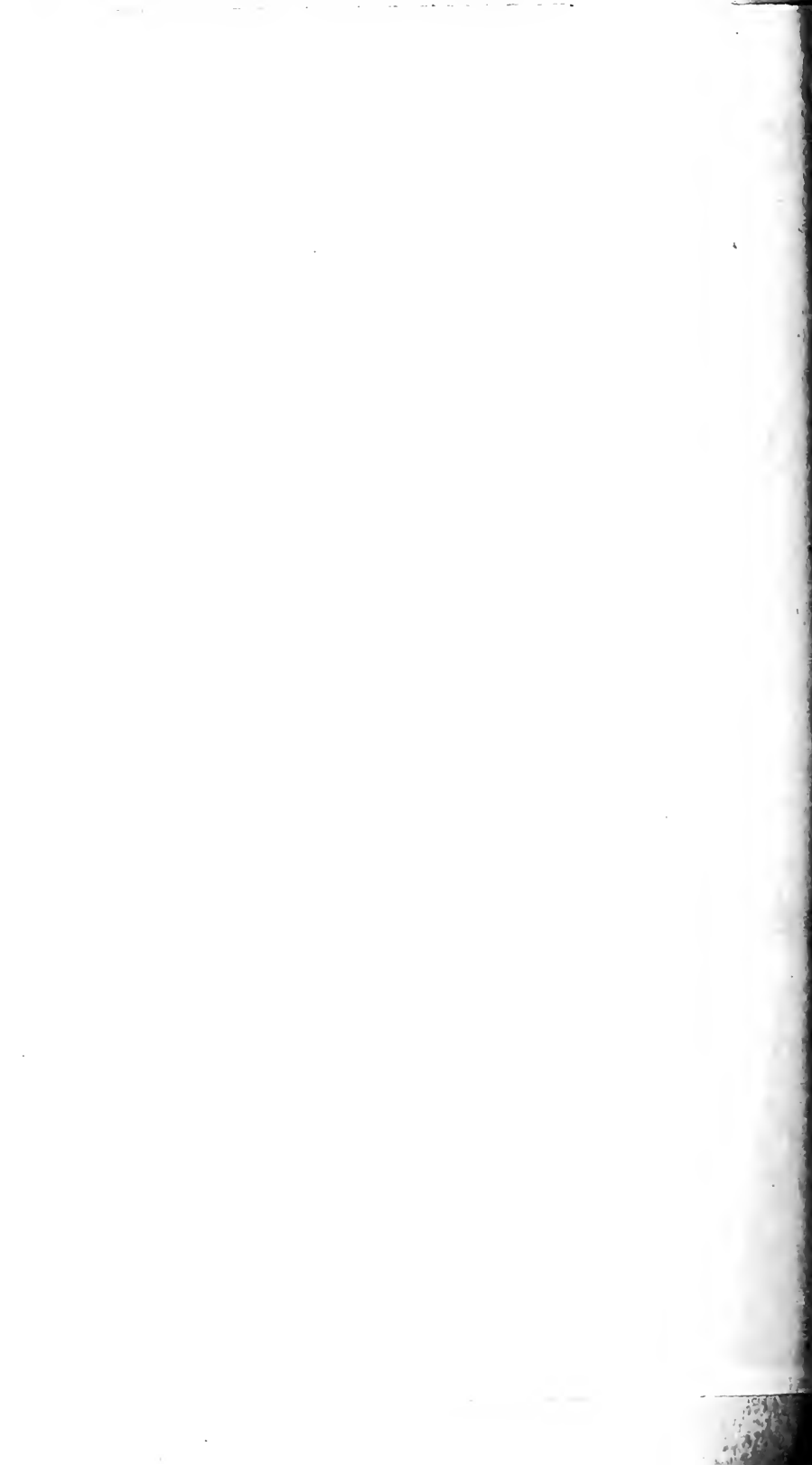
[Endorsed]: Filed Sept. 10, 1949.

Prop. 10
Prop. F
H. 10
18
Wh. 10
524

Township 11 N
Range 10 E
1867

101





[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to the notice of appeal heretofore filed by the defendants in the above cause, the entire transcript of record in the above cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 10, 1949.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5824

ALFHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees of
the Nordale Estate Trust,

Plaintiffs,

vs.

A. E. WAXBERG and WM. A. BIRKLID,
Defendants.

TRANSCRIPT OF TRIAL

Maurice T. Johnson, of Fairbanks, Alaska, Attor-
ney for Plaintiffs.

Warren A. Taylor, of Fairbanks, Alaska, and
Bailey E. Bell, of Anchorage, Alaska, Attor-
neys for Defendants.

Be It Remembered, that upon the 9th day of
May, 1949, at 10:00 o'clock a.m., the above-entitled
cause came on regularly for trial before the Court;
the Honorable Harry E. Pratt, District Judge, pre-
siding;

That the Plaintiff Alfheld Hjalmar Nordale was
present and represented by his attorney of record;
that the Defendants were present in person and
represented by their attorneys of record;

And Thereupon, the following proceedings were
had:

The Court: This is the time set for trial in the

case of Nordale against Waxberg, et al. Parties ready? [1*]

Mr. Johnson: The Plaintiffs are ready, your Honor.

Mr. Taylor: The Defendants are ready.

The Court: Very well, proceed.

A. H. NORDALE

whereupon, Alfheld Hjalmar Nordale was duly sworn as a witness on his own behalf.

Mr. Taylor: If the Court please, I would like to have Mr. Bell entered as associate counsel in the case.

The Court: Bailey Bell?

Mr. Taylor: Yes, sir.

The Court: Very well, he may be so entered.

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. A. H. Nordale.

Q. Are you Alfheld Hjalmar Nordale, one of the Plaintiffs in this case? A. I am.

Q. Are you related to Arnold Mauritz Nordale, the other Plaintiff? A. Yes.

Q. And where do you reside, Mr. Nordale?

A. Fairbanks, Alaska.

Q. How long have you lived in Fairbanks?

A. Forty-five years. Forty-four years. [2]

* Page numbering appearing at foot of page of original Reporter's Transcript.

(Testimony of A. H. Nordale.)

Q. When you first came to Fairbanks, with whom did you come?

A. My father and mother.

Q. And your brother, Arnold? A. Yes.

Q. And you moved to Fairbanks from where?

A. Dawson, Yukon Territory.

Q. What year was that? A. 1904.

Q. And you have lived in Fairbanks ever since that time, have you?

A. With occasional short intermissions. I have been in the service, or out on the creeks.

Q. In other words, you have resided in Alaska—you have been a resident of Alaska ever since that time? A. Yes.

Q. Are you acquainted with the property in question in this suit known as Lot 6 in Block 4 of the Townsite of Fairbanks? A. I am.

Q. Where is that lot located, generally?

A. It is located on the intersection of First and Lacey on the north side of First Street.

Q. And on the west side of Lacey?

A. On the west side of Lacey.

Q. It would then be the northwest corner of First and Lacey, is that right? [3]

A. Would it be?

Q. Well, it is on the north side of First, and the west side of Lacey, it would be the northwest corner of that intersection, is that right?

A. That is correct.

Q. When, if ever, did your father acquire any interest in that lot? A. 1921.

(Testimony of A. H. Nordale.)

Q. And how much of an interest did he acquire at that time?

Mr. Taylor: If the Court please, I object on the grounds it is calling for a conclusion. The deed would be the best evidence.

Mr. Johnson: This is just preliminary, your Honor, leading up to the introduction of the deeds.

The Court: All right. I will overrule the objection. (Pause) I will sustain the objection.

Q. You say about 1921? A. 1921.

Q. And who, if anyone, owned an interest in the lot? A. Peter Vachon.

Q. Did Peter Vachon and your father, subsequent to 1921, acquire or receive a trustee's deed from the Townsite Trustee of Fairbanks?

A. In 1922, I believe.

Mr. Johnson: Would you mark these? [4]

Clerk of Court: Plaintiffs' Identification Number "1." Plaintiffs' Identification Number "2." Plaintiffs' Identification Number "3." Plaintiffs' Identification Number "4."

(Plaintiffs' Identification Numbers "1," "2," "3" and "4" marked.)

Mr. Johnson: At this time, your Honor, I would like to offer in evidence Plaintiffs' Identification Number "4," which is a certified copy of the Trustee's Deed from George A. Parks, Townsite Trustee, to Peter Vachon and A. H. Nordale, covering Lot 6 in Block 4 of the Townsite of Fairbanks.

Mr. Taylor: No objections, your Honor.

(Testimony of A. H. Nordale.)

The Court: Very well, it may be admitted.

Clerk of Court: Plaintiffs' Exhibit "A."

(Plaintiffs' Identification "4" admitted in evidence as Plaintiffs' Exhibit "A.")

PLAINTIFFS EXHIBIT A

United States of America,

Territory of Alaska, Fourth Judicial Division—ss.

I, the undersigned, United States Commissioner for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, do hereby Certify that the hereto attached is a full, true and correct copy of the Trustee's Deed, Geo. A. Parks, Grantor, and Peter Vachon and A. J. Nordale, Grantees, filed for record April 14, 1922, in Book 22, Page 175, Instrument Number 55,954 on file and record in my office.

In Testimony Whereof, I have hereto subscribed my name and affixed my official seal at Fairbanks, Alaska, this 2nd day of May, 1949.

[Seal] /s/ CLINTON B. STEWART,
United States Commissioner and Recorder, Fairbanks Precinct.

[Seal] By /s/ MARIE D. GORMAN,
Deputy Recorder and Clerk
of the Probate Court.

55954

Trustee's Deed

This Indenture, made this first day of March, in the year of our Lord one thousand nine hundred and twenty-two, by and between Geo. A. Parks, as

(Testimony of A. H. Nordale.)

trustee for the townsite of Fairbanks, in the Territory of Alaska, party of the first part, and Peter Vachon and A. J. Nordale of Fairbanks, Alaska, parties of the second part, Witnesseth, That said party of the first part, as such trustee, by virtue of the power vested in and conferred upon him by the terms of section 11 of the act of Congress approved March 3, 1891 (26 U. S. Stat., 1095), and the regulations thereunder and the patent issued to him thereon, and in consideration of the sum of Fifty-four and 24/100 (\$54.24) dollars, the amount of the assessments upon the premises hereinafter described, the receipt of which is hereby acknowledged, by these presents does grant, convey, and confirm unto the said parties of the second part and their heirs and assigns all the following lot, piece, and parcel of land situate in the townsite of Fairbanks and Territory of Alaska, described as follows, to wit: Lot 6 in Block 4, according to the official plat of survey of said townsite. Subject to rights and reservations in said patent expressed. To Have and To Hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever.

In Witness Whereof said party of the first part, as such trustee, has hereunto set his hand and seal on the day and year first above written.

[Seal] GEO. A. PARKS,

Trustee for the townsite of Fairbanks, Territory of Alaska.

(Testimony of A. H. Nordale.)

In presence of:

GILBERT A. TUBEN,
JNO. P. WAINE.

Territory of Alaska:

Be It Remembered, That on this ninth day of March, A.D. 1922, before me, a Notary Public, came Geo. A. Parks, to me personally known to be the trustee of said townsite of Fairbanks, and the identical person described in, and whose name is affixed to, the foregoing conveyance as grantor, and he acknowledged the execution of the same to be his voluntary act and deed as such trustee, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal on the day and year first above written.

[Seal] WALTER B. HEISEL,
Notary Public for Alaska.

My commission expires March 1, 1926.

Filed for record April 14th, 1922 at 45 min. past 10 A.M. M. R. Boyd, Recorder.

[Endorsed]: Filed Oct. 3, 1949, U.S.C.A.

The Court: I will see it, Mr. Johnson.

(Whereupon, Mr. Johnson handed the Exhibit to the Court.)

Clerk of Court: Plaintiffs' Identification Number "5."

(Testimony of A. H. Nordale.)

(Plaintiffs' Identification Number "5" marked.)

The Court: This Deed is Lot 6 in Block 4, according to the official Plat and Survey. Do you intend to introduce the official Plat and Survey? [5]

Mr. Johnson: Yes, your Honor. The City Engineer will be here with that.

The Court: Very well. I don't believe you had a chance to mark this yet, Mr. Clerk.

(Whereupon, the Exhibit was handed to the Clerk of the Court to be marked.)

Q. After 1922, did your father acquire the interest of Peter Vachon in this Lot 6 of Block 4?

A. He did.

Mr. Johnson: If the Court please, at this time we would like to offer in evidence Plaintiffs' Identification "5," which is a certified copy of a deed to Lot 6 in Block 4, the property in question, running from Peter Vachon to A. H. Nordale.

Mr. Taylor: If the Court please, I am going to object to the introduction of this at the present time, until such time as the official Plat of the Town is introduced in evidence, so we can compare this with the official Plat. I believe the metes and bounds are considerably different than the Plat of the Town.

The Court: Let me see that.

Mr. Johnson: The metes and bounds have been increased over the years. I think that will be con-

(Testimony of A. H. Nordale.)

nected up with the evidence. That calls for Lot 6, Block 4 of the Townsite of Fairbanks, according to the official Plat. [6]

The Court: And you wish to have the Plat introduced before the Deed? Is that your—— (interrupted)

Mr. Taylor: Well, I would, unless counsel stipulates that applies to Lot 6 of Block 4 of the official Plat, if that is all that was introduced for.

The Court: If he stipulates that this deed refers to Lot 6 of Block 4?

Mr. Taylor: Of the official Plat, your Honor.

The Court: As shown on the official Plat? Do you wish to do that?

Mr. Johnson: Well, no. Lot 6, Block 4 of the official Plat has been increasing over a period of years. That is the contention. Defendants have not denied any of the allegations we have made, except the matter of the accretions, and it is our contention—I think we will—— (interrupted)

The Court: All right, objection overruled. It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "B."

(Plaintiffs' Identification "5" admitted in evidence as Plaintiffs' Exhibit "B.")

PLAINTIFFS' EXHIBIT B

United States of America,

Territory of Alaska, Fourth Judicial Division—ss.

I, the undersigned, United States Commissioner

(Testimony of A. H. Nordale.)

for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, do hereby Certify that the hereto attached is a full, true and correct copy of the Deed by and between Peter Vachon, party of the first part, and A. J. Nordale, party of the second part, as recorded November 25, 1930 in Volume 25 of Deeds page 357, on file and record in my office.

In Testimony Whereof, I have hereto subscribed my name and affixed my official seal at Fairbanks, Alaska, this 27th day of April, 1948.

[Seal] /s/ EVERETT E. SMITH,
United States Commissioner and Recorder, Fairbanks Precinct.

By /s/ MARIE D. GORMAN,
Deputy Recorder.

69235

This Indenture, Made and executed on this, the 14th. day of July, A.D. 1928, By and Between Peter Vachon, of Fairbanks, Territory of Alaska, Territory of Alaska, party of the first part, and A. J. Nordale, of the same place, party of the second part, Witnesseth:

That the party of the first part, for and in consideration of the sum of One dollar(s), and other good and valuable considerations, to him in hand paid by the party of the second part, receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant,

(Testimony of A. H. Nordale.)

bargain, sell, quitclaim, and convey, unto the party of the second part, all the following described real estate, situate, lying, and being in the Fairbanks Mining and Recording Precinct, Territory of Alaska, to-wit: An undivided one-half interest in and to:

All that certain real property situate in the Town of Fairbanks, Territory of Alaska, described as commencing at the northwest corner of Lacy Street and First Avenue in said town, running thence westerly along the north line of said First Avenue a distance of one hundred and six feet, more or less, to a post; thence northerly to the Chena River; thence easterly along the bank of said river a distance of one hundred and six feet, more or less; thence southerly on a line with the westerly line of Lacy Street a distance of ninety feet, more or less, to the place of beginning; being what is commonly known as the Carroll & Parker lot; which said lot is now known on the official map and survey of said town of Fairbanks, as Lot Number -6- in Block Number -4-; together with all and singular the buildings, structures, and improvements situate thereon, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof;

To Have And To Hold unto the said party of the second part in and to his heirs, executors, administrators, successors in interest, and assigns forever.

In Witness Whereof, the party of the first part

(Testimony of A. H. Nordale.)

has hereto set his hand and seal on the day and year hereinabove first written.

In the presence of:

R. H. GEOGHEGAN,

JOHN A. CLARK.

[Seal] PETER VACHON.

United States of America,

Territory of Alaska—ss.

This Is To Certify that, on this, the 14th day of July A.D. One Thousand Nine Hundred Twenty Eight, before me, the undersigned, a Notary Public in and for the Territory of Alaska, residing therein, duly commissioned and sworn, personally appeared Peter Vachon by me known to be the individual mentioned in and who executed the within and foregoing instrument, and he acknowledged to me that he signed and sealed it as his free and voluntary act and deed for the uses and purposes therein specified.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year above in this certificate first written.

[Seal] JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires 24 April 1930.

Filed for record: Nov. 25, 1930, at 41 min. past 2 P.M. M. R. Boyd, Recorder.

(Testimony of A. H. Nordale.)

Mr. Taylor: May I have one more look at that?

Mr. Johnson: Yes. Just a minute.

. (Mr. Johnson gave the Exhibit to the Clerk of Court to be marked.)

Q. Subsequent to the time that your father acquired the interest of Peter Vachon, did he pass away? [7] A. Yes, he did.

Q. And what, if any, disposition was made of his property? Did he leave a will?

A. He willed his property to my mother.

Q. Was she the sole heir? A. She was.

Q. And was the property distributed to her as the sole heir and legatee? A. It was.

Clerk of Court: Plaintiffs' Identification Number "6."

(Plaintiffs' Identification Number "6" marked.)

Mr. Johnson: If the Court please—oh, incidentally, I would like to consider the Plaintiffs' Exhibits "A" and "B" as having been read, your Honor.

The Court: Very well.

Mr. Johnson: If counsel has no objection. I would like, at this time, to offer Plaintiffs' Identification "6," which is a certified copy of the Order Settling the Final Account and for Distribution in the Matter of the Estate of A. H. Nordale, deceased, Probate 446, Vol. 15, page 292 of the Probate Docket.

(Testimony of A. H. Nordale.)

Mr. Taylor: No objection, your Honor.

The Court: It may be admitted. [8]

Clerk of Court: Plaintiffs' Exhibit "C".

(Plaintiffs' Identification "6" admitted in evidence as Plaintiffs' Exhibit "C".)

PLAINTIFFS' EXHIBIT C

United States of America,

Territory of Alaska,

Fourth Judicial Division—ss.

I, the undersigned, United States Commissioner for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, do hereby Certify that the hereto attached is a full, true and correct copy of the Order Settling Final Account and for Distribution, In the Matter of the Estate of A. J. Nordale, Deceased. Probate No. 446, entered in Vol. 15, Page 292 of the Probate Docket, on file and record in my office.

In Testimony Whereof, I have hereto subscribed my name and affixed my official seal at Fairbanks, Alaska, this 2nd day of May, 1949.

[Seal] CLINTON B. STEWART,

United States Commissioner and Recorder, Fairbanks Precinct.

[Seal] By /s/ MARIE D. GORMAN,

Deputy Recorder and Clerk of the Probate Court.

(Testimony of A. H. Nordale.)

In the Probate Court for the Territory of Alaska,
Fairbanks Precinct

No. 446

In the Matter of

The Estate of A. J. NORDALE, Deceased.

ORDER SETTLING FINAL ACCOUNT AND
FOR DISTRIBUTION

Comes now Anna Mathilda Nordale, the executrix of said estate, by G. A. O. Bondy, her attorney, and proves to the satisfaction of this court that her final account and petition for distribution herein was rendered and filed on the 26th day of November, 1941; that on the same day the Court appointed the 30th day of January, 1942, for the settlement and hearing thereof; that due and legal notice of the time and place of said settlement and hearing has been given as required by law; and the said account and petition being now presented to the court and no person appearing to except or contest the same, the court, after hearing the evidence, and being satisfied that there are no taxes due and payable upon the property of said estate, settles said account and order distribution of said estate as follows:

It is ordered, adjudged, and decreed by the court, That said executrix has in her possession, belonging to said estate a balance of \$7,282.39 consisting of the property hereinafter described, and mentioned in the inventory filed herein; that said account be al-

(Testimony of A. H. Nordale.)

lowed and settled accordingly; and that in pursuance of and according to the provision of the last will and testament of said deceased, the property of said estate distributed and awarded to Anna Mathilda Nordale, the sole beneficiary under said will, and is described as follows, to wit:

Lots 4 & 6 in Block 4, in the Town of Fairbanks, Alaska, together with all improvements and buildings thereon.

Lots 1, 2, 3, & 5 of Block 69, in the Town of Fairbanks, Alaska, together with all buildings and improvements thereon.

Lot 7 of Block 78, in the Town of Fairbanks, Alaska.

The Hope, Fairbanks, Keystone, Kawllite and Wolf lode mining claims at head of Wolf Creek in the Fairbanks Mining and Recording Precinct, Alaska.

And

The amount of \$1,128.78 accrued wages, due estate from Nordale Hotel Corporation.

Promissory Note executed April 6, 1925, by David Strandberg to A. J. Nordale, for the amount of \$50.00.

10 shares of the common stock of Merchant Calculating Machine Company as evidenced by Certificate No. 5735.

1 Share of the common capital stock of Fairbanks Airplane Company, as evidenced by Stock certificate No. 43.

(Testimony of A. H. Nordale.)

1244 shares of the Common capital stock of the Nordale Hotel Corporation, as per Stock Certificate No. VI.

Two (2) shares of the common stock of Tanana Valley Fair Association.

Twenty (20) shares of the common stock of Tanana Valley Agricultural Association.

All furniture and fixtures contained and being in the home or residence of said executrix on Lots 1, 2 & 3 in Block 69, in Town of Fairbanks, Alaska, aforesaid.

Dated at Fairbanks, Alaska, this 3rd day of March, 1942.

[Probate Seal.]

/s/ WILLIAM N. GROWDEN,
Probate Judge.

Filed: March 3, 1942, William N. Growden, U.S. Commissioner & Ex Officio Probate Judge.

The Court: I will take it, Mr. Johnson.

Q. Subsequent to your father's death, did your mother establish a trust covering the property in question and other property, which trust is known as the Nordale Estate Trust? A. She did.

Q. Was there a written declaration of trust executed at that time? A. There was.

Clerk of Court: Plaintiffs' Identification "7".

Q. I will show you Plaintiffs' Identification

(Testimony of A. H. Nordale.)

Number "7", and will ask you to tell the Court what that is, if you know?

A. That is the Declaration of Trust given by my mother.

Q. Does that bear your signature?

A. It does.

Q. The signature of your brother as trustee?

A. That is right.

Q. Is that the original document?

A. That is the original.

Q. Has that document been filed of record?

A. It has.

Q. In the Recorder's Office?

A. It has. [9]

Mr. Johnson: If the Court please, we now offer in evidence Plaintiffs' Identification "7".

Clerk of Court: Plaintiffs' Identification Number "8".

(Plaintiffs' Identification Number "8", marked.)

Mr. Taylor: No objection, your Honor.

The Court: It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "D".

(Plaintiffs' Identification "7" admitted in evidence as Plaintiffs' Exhibit "D".)

PLAINTIFFS' EXHIBIT D

Declaration of Trust

Know All Men By These Presents: That we, Alpheld Hjalmar Nordale, of Fairbanks, Alaska, and

(Testimony of A. H. Nordale.)

Arnold Mauritz Nordale, of Dawson, Yukon Territory, do hereby admit, certify, and declare that upon this date there has been transferred, assigned, and conveyed to us, as grantees and Trustees, by Anna Mathilda Nordale, of Fairbanks, Alaska, as grantor and Trustor, the following described real and personal property, situate in the Fairbanks Mining and Recording District, Fourth Division, Territory of Alaska, to wit:

1244 shares of the common capital stock of the Nordale Hotel Corporation;

Lots Four (4) and Six (6) in Block Four (4); and Lots One (1), Two (2), Three (3), and Five (5) in Block Sixty-nine (69); and Lot Seven (7) in Block Seventy-eight (78) of the town of Fairbanks, Alaska, according to the map and plat thereof on file in the office of the City Clerk of said town of Fairbanks, Alaska, and known as the "L. S. Robe Plat"; and

The following described patented quartz mining claims, to wit:

Hope Lode Claim

Fairbanks Claim

Keystone Claim

Kawilita Claim

a more particular description of which is set forth in the patent granted by the United States to A. J. Nordale, which said patent is recorded in Volume 19 of Deeds, at page 591 thereof, of the records of said Fairbanks Recording District; and also

That certain unpatented quartz mining claim

(Testimony of A. H. Nordale.)

known as the Wolf Lode Claim, which said claim is bounded on the south by said Keystone Claim and on the east by said Fairbanks Claim.

The conveyance and transfer of said property has been accepted by us as trustees, and we hereby declare and agree that we will hold said property, and all other funds and property at any time transferred to and received by us, in trust hereunder for the following named persons and upon the following terms and conditions, to wit:

(1) In Trust, during the life of Anna Mathilda Nordale, herein known as the Trustor, for her sole and exclusive use and benefit, and it is an express condition and provision of this trust, that, during the life of said Trustor, she shall have the right and shall be allowed to continue in the full, free, and undisturbed possession of the trust estate—save and except said stock of the Nordale Hotel Corporation and of the mining claims hereinabove described—without any rental or accounting for the rents or issues derived therefrom to said Trustees, or to any of the beneficiaries under this trust.

(2) In Trust—upon the death of said Trustor—and for the sole use and benefit of the following named persons, to wit:

Alfheld Hjalmar Nordale, of Fairbanks, Alaska,
Arnold Mauritz Nordale, of Dawson, Yukon Territory,

Anita Mildred Cox, of Tiburon, California,

Katherine Driscoll Nordale, of Fairbanks, Alaska,

(Testimony of A. H. Nordale.)

Adler Jennings Nordale, of Fairbanks, Alaska, and

Alice Dolores Couey, of Fairbanks, Alaska, said above named persons being trust beneficiaries only, and their respective beneficial interest in said trust estate is as follows:

Alfheld Hjalmar Nordale, an undivided 5/15 interest,

Arnold Mauritz Nordale, an undivided 2/15 interest.

Anita Mildred Cox, an undivided 2/15 interest,
Katherine Driscoll Nordale, an undivided 2/15 interest,

Adler Jennings Nordale, an undivided 2/15 interest, and

Alice Dolores Couey, an undivided 2/15 interest.

(3) In Trust—save and except as provided in paragraph (1) hereof—to collect and receive all rents and incomes from said property, and semi-annually, or oftener, at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to the Trustor or the said beneficiaries, as hereinabove provided, according to their respective interest; and, in this connection, the Trustees shall have full authority from time to time to use any funds on hand, whether received as capital or income, for the purposes of any repair, improvement, protection, or development of the properties held hereunder (save and except that the said Trustees herein shall not engage in or carry on, except as les-

(Testimony of A. H. Nordale.)

sors, any mining operations), or the acquisition of any property as to the Trustees may be determined to be wise and expedient, for the protection and development of the trust property as a whole, pending its conversion and distribution. The determination of the Trustees, made in good faith as to all questions as between "capital" and "income," shall be final.

(4) In Trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having for such purposes all and as full discretionary power and authority as they would have if they were themselves the sole and exclusive beneficial owners thereof, including the right to vote said stock of the Nordale Hotel Corporation as in their judgment may seem most advisable.

(5) In Trust, pending final conversion and distribution, by and with the consent, in writing, of a majority in interest of the beneficiaries, to sell, lease, bond, mortgage, and exchange any of the property belonging to the trust; and, in addition to the power and authority conferred upon the Trustees by paragraph (3) hereof, to repair, improve, protect, and develop the property of the trust out of funds in the hands of the Trustees, the Trustees may, by and with the consent in writing of a majority in interest of the beneficiaries, borrow money to make repairs, and improvements, and to develop and acquire other properties which they deem es-

(Testimony of A. H. Nordale.)

sential and beneficial to the trust; and for said purposes the Trustees may fix the time of any loan and may pledge and mortgage any of the properties of the trust as security therefor, as they deem advisable.

(6) The Trustees may employ all such agents and attorneys as they may think proper, and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors, or omissions of such agents or attorneys employed and retained, with reasonable care.

(7) The Trustees shall at all times keep full and proper books of account and records of their proceedings and business and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability, except for the result of his own gross negligence or bad faith.

(8) The Trustees shall be entitled to receive reasonable compensation for services, not exceeding one per cent. (1%) of the total gross annual income received by them as such Trustees; unless, hereafter, a majority in interest of the beneficiaries shall consent in writing to some larger compensation. The Trustees shall also be entitled to reimbursement and indemnification for all proper expenses, and shall be entitled at all times to the advice of counsel.

(9) Any Trustee hereunder may resign by a

(Testimony of A. H. Nordale.)

written instrument, duly acknowledged, and attached to the original of this instrument or recorded with the Recorder of the Fairbanks Recording District of Alaska. Any vacancy in the office of Trustee, however occasioned, shall be filled by the remaining Trustee by an instrument in writing, signed by him, and assented to in writing by the holders of a majority in interest of the beneficiaries. Such appointment to be in like manner attached to the original of this instrument or recorded in said Recording District, as in the case of the resignation last above provided for.

(10) In the event of the absence from the Territory of Alaska of either of the Trustees hereunder, or in the event that either of said Trustees is incapacitated, through illness or otherwise, from performing his duty as Trustee, then the other Trustee shall, at such time or times, have and may exercise any and all the powers given to the Trustees hereunder, with like effect as if similarly exercised by both of them.

(11) The terms and provisions of this trust may be modified at any time by instruments in writing signed and sealed and acknowledged by the then Trustees, and assented to in writing, by the holder or holders of the majority in interest of the beneficiaries, attached to the original of this instrument or recorded with the Recorder of said Fairbanks Recording District.

(12) The certificate in writing of the Trustees as to any resignation from the office of Trustee here-

(Testimony of A. H. Nordale.)

under and as to the appointment of any new Trustee hereunder, and as to the existence or non-existence of any modification hereof, may always be relied upon and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees and relying upon such certificate.

(13) The title for this trust (fixed for convenience) shall be "Nordale Estate Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successive Trustees.

(14) The life of this trust shall continue for a period of twenty (20) years after the death of the Trustor, Anna Mathilda Nordale, but said Trustees, by and with the consent of a majority in interest of the beneficiaries, may convert said estate into money and distribute any proceeds thereof among the beneficiaries entitled thereto at any time within said period of twenty (20) years, until the estate herein or the property hereunder is fully converted and distributed to the beneficiaries; and the respective interests of the beneficiaries hereunder, for the purpose of transmission and otherwise, shall be deemed personal property.

At the end of twenty (20) years from and after the death of said Trustor (unless the estate shall sooner be converted and distributed and said trust lawfully terminated), all property of every kind then held hereunder shall be sold by the Trustees, and equitable distribution made by them of the net proceeds among the persons then entitled thereto,

(Testimony of A. H. Nordale.)

unless the majority in interest of the beneficiaries shall elect to extend the life of this trust beyond that period.

In Witness Whereof, the said Trustees have hereunto set their hands and seals in triplicate on this the 4th day of November, in the year one thousand nine hundred forty, A.D.

[Seal] /s/ ALFHELD HJALMAR
 NORDALE,
 Trustee.

[Seal] /s/ ARNOLD MAURITZ
 NORDALE,
 Trustee.

In the presence of:

 /s/ J. L. BLOCKHUS.

 /s/ DOROTHY RUSSELL.

 /s/ A. F. DAILY.

 /s/ M. E. A. SEALEY.

United States of America,
Territory of Alaska—ss.

This Is To Certify That on this, the 4th day of November, 1940, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Alpheld Hjalmar Nordale, personally known to me to be the identical individual named in and who executed the foregoing Declaration of Trust as Trustee thereunder, and he acknowledged to me that he did so freely and voluntarily, for the uses and purposes mentioned therein.

(Testimony of A. H. Nordale.)

Witness my hand and Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ DOROTHY RUSSELL,
Notary Public in and for the Territory of Alaska.
My commission expires Nov. 16, 1942.

Mr. Johnson: I would like to have Plaintiffs' Exhibits "C" and "D" considered read.

The Court: Yes.

Q. Now, Mr. Nordale, in connection with the establishment of this Nordale Estate Trust, at the same time that the Declaration of Trust was executed, did your mother execute a Deed in Trust to you and your brother, covering this property, as well as other property? A. She did.

Q. I will show you a document marked for Identification as Plaintiffs' Identification "8". I will ask you to look at that and tell the Court what it is, if you know?

A. This is a Deed in Trust from my mother.

Q. Is that the original deed signed by your mother? [10]

A. That is.

Q. That is her signature? A. Yes.

(Testimony of A. H. Nordale.)

Q. Was it recorded in the Recorder's Office of the Fairbanks Precinct? A. It was.

Mr. Johnson: We will offer Plaintiffs' Identification "8".

Mr. Taylor: No objection.

The Court: It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "E".

(Plaintiffs' Identification "8" admitted in evidence as Plaintiffs' Exhibit "E".)

PLAINTIFFS' EXHIBIT E

Know All Men By These Presents: That I, Anna Mathilda Nordale, of Fairbanks, Alaska, as Grantor and first party, do hereby grant, bargain, sell, assign, transfer, and set over unto Alfheld Hjalmar Nordale, of Fairbanks, Alaska, and Arnold Mauritz Nordale, of Dawson, Yukon Territory, as Grantees and Trustees, and upon the terms and conditions set forth in a certain Declaration of Trust this day executed by said Trustees, reference to which is hereby made for further particulars, all of the following described property situated in the Fairbanks Mining and Recording District, Fourth Division, Territory of Alaska, and more particularly described as follows, to-wit:

1244 shares of the common capital stock of the Nordale Hotel Corporation;

Lots Four (4) and Six (6) in Block Four (4); and Lots One (1), Two (2), Three (3) and Five (5) in Block Sixty-nine (69); and Lot Seven (7) in

(Testimony of A. H. Nordale.)

Block Seventy-eight (78) of the town of Fairbanks, Alaska, according to the map and plat thereof on file in the office of the City Clerk of said town of Fairbanks, Alaska, and known as the "L. S. Robe Plat"; and all buildings and improvements located thereon; and

The following described patented quartz mining claims, to-wit: Hope Lode Claim, Fairbanks Claim, Keystone Claim, Kawilita Claim, a more particular description of which is set forth in the patent granted by the United States to A. J. Nordale, which said patent is recorded in Volume 19 of Deeds, at page 591 thereof, of the records of said Fairbanks Recording District; and also

That certain unpatented quartz mining claim known as the Wolf Lode Claim, which said claim is bounded on the south by said Keystone Claim and on the east by said Fairbanks Claim.

Together With, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

To Have And To Hold the same unto the said Trustees, upon the terms and conditions set forth under said Declaration of Trust hereinabove referred to.

In Witness Whereof, I have hereunto set my hand and seal on this, the 4th day of November, in the year one thousand nine hundred forty, A.D.

[Seal) /s/ ANNA MATHILDA NORDALE.

(Testimony of A. H. Nordale.)

In the presence of:

/s/ JOHN L. McGUIN.

/s/ DOROTHY RUSSELL.

United States of America,

Territory of Alaska—ss.

This Is To Certify That on this, the 4th day of November, 1940, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Anna Mathilda Nordale, known to me to be the identical individual named in and who executed the foregoing instrument, and she acknowledged to me that she did so freely and voluntarily, for the uses and purposes mentioned therein.

Witness my hand and Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ DOROTHY RUSSELL,

Notary Public in and for the
Territory of Alaska.

My commission expires Nov. 16, 1942.

Mr. Johnson: If the Court please, we would like to consider read Plaintiffs' Exhibit "E".

The Court: Yes.

Q. Mr. Nordale, will you describe what type of building, if any, is on the property known as Lot 6 in Block 4?

A. A frame and iron building.

(Testimony of A. H. Nordale.)

Q. How large a building would you say that was, or do you know?

A. I do not know definitely. It is probably 50 feet wide and approximately 85 or 90 feet long.

Q. How long has that building been on the premises, if you know? [11]

A. Since—one-half of it since 1905 or '06.

Q. And which half do you mean?

A. That would be the Easterly half. It was added to approximately a year later; the Westerly portion was put on.

Q. Then the building was always 85 or 90 feet long, as you originally knew it?

A. That is correct.

Q. But it was widened afterwards?

A. It was widened somewhat.

Q. What was on that property prior to the time the building was put on, if you know?

A. A saw mill.

Q. Do you know who had the saw mill there?

A. Parker and Carroll.

Q. Do you know when they put it on?

A. Sometime during the summer of 1903.

Q. And do you know how long that saw mill was there? A. Approximately two years.

Q. Now, you have, as you say, lived in Fairbanks and vicinity for many, many years. Have you had occasion to observe the action of the Chena River just back of this property?

A. I have, very closely.

(Testimony of A. H. Nordale.)

Q. When you first came to Fairbanks in 1904 or '05, can you describe how the channel of the river was, behind this property at that time? [12]

A. I came to Fairbanks in October of 1904, and at that time the mill was in operation—— (interrupted).

Mr. Taylor: Just a moment, I am going to object to the question and answer on the grounds the title of this was derived in 1922. I think any action of the Chena River would necessarily have to be from the time it was bought from the predecessors in interest of the Plaintiff.

Mr. Johnson: Well, if the Court please, the title was derived from the Federal Government, and it began building up prior to that time. I think we have the right to show what the action of—— (interrupted).

The Court: Objection overruled.

Q. Go ahead, Mr. Nordale, will you explain how the Chena River channel was running just behind this property at the time you first came here?

The Court: Just a moment, can't you make it more specific by introducing the map and telling the situation with reference to the lines that were shown by the map, so we would have something more definite?

Mr. Johnson: Yes, your Honor.

Q. Mr. Nordale, I will show you Plaintiff's Identification "3" and I will ask you if you can tell what that is?

(Testimony of A. H. Nordale.)

A. That is a map of the property in question.

Q. By whom was it prepared?

A. By the Alaska Architectural and Engineering Company. [13]

Q. At whose request? A. At my request.

Q. And what does that plat purport to show at the present time?

A. It shows the boundaries of the lot—Lot 6 in Block 4; the original meander line, and the present bank of the Chena River.

Q. Does it show the location of the building that you have described? A. It does.

Q. How is that shown on that plat?

A. By broken lines.

Q. Does it show the portion of the property which has been taken possession of by the Defendants? A. It does.

Q. How is that shown?

A. By broken lines.

Q. Well, are they the same as the other, or are they?

A. It is shown in the same manner, and it is described as the "Birkliid and Waxberg Building".

Q. That is shown on that plat? A. Yes.

Q. Are the distances given on that plat?

A. They are.

Q. Are the distances, as shown by the original—from the original meander line and also to the present meander line [14] of the river—are those distances given?

(Testimony of A. H. Nordale.)

A. They are. They are given.

Q. There is a line marked in pencil "A" and "B". Can you tell what that is? There is a line here marked "A" and "B"—

(Interrupted.)

Mr. Taylor: Just a moment, I believe this has gone far enough. I make an objection upon the grounds that the man who made the copy of the map will be the best witness, your Honor.

Mr. Johnson: He will be here, your Honor, but I thought I would identify it as far as I could with Mr. Nordale.

The Court: Don't you require the original map, itself? That will be hearsay.

Mr. Johnson: The original map will also be here, your Honor. I have the Engineer coming over with that. That is the original Townsite map.

The Court: That is——

Mr. Johnson: We have a copy made from the original survey. The tracing will be identified by the Engineer as being made from the original survey notes.

The Court: I think I will require you to proceed in the exact order that is required by law. First, show your map; your official map.

Mr. Johnson: Very well. May I have leave to excuse Mr. Nordale for the moment and call the City Engineer? [15]

The Court: Yes. Step down, Mr. Nordale.

(Whereupon, Mr. Nordale was temporarily

excused as a witness and left the witness stand.)

Mr. Johnson: With the permission to recall Mr. Nordale when——(interrupted)

The Court: Yes.

JAMES R. WILCOX

was called as a witness on behalf of the Plaintiffs, and was duly sworn and testified as follows:

Direct Examination

By Mr. Johnson:

Q. State your name, please.

A. James R. Wilcox.

Q. Where do you reside, Mr. Wilcox?

A. Fairbanks.

Q. What, if any, official position do you hold in the Town of Fairbanks?

A. I am the City Engineer.

Q. As City Engineer, do you have in your custody the original survey notes of the Townsite of Fairbanks?

A. I have a copy of them.

Q. And do you have the official map of the Townsite of Fairbanks, as based on the survey?

A. Yes. [16]

Q. Have you made a copy of that map at my direction?

A. Yes, I have.

Clerk of Court: Plaintiffs' Identification Number "9".

(Plaintiffs' Identification Number "9", marked.)

(Testimony of James R. Wilcox.)

Q. I will show you Plaintiffs' Identification Number "9", and ask you what that is—what that purports to be?

A. This is a print of the original plat of the Townsite.

Q. Was that made up from the original tracing?

A. It is made up from a copy of the original tracing; a photo copy is what it is.

Q. And do you know whether or not this Identification Number "9" is true and correct?

A. Yes, it is.

Q. It is a true and correct representation of the original Townsite survey of the Town of Fairbanks, is that correct?

A. That is right.

Q. It shows all of the meander lines and boundaries?

A. Yes. That is all the information that was taken from the survey notes—the original survey notes.

Mr. Johnson: We would like to offer this in evidence.

Mr. Taylor: We object, your Honor, upon the grounds proper foundation hasn't been laid. No reason shown for the original not being introduced.

The Court: Objection sustained.

Q. Do you know where the original tracing or plat is, of this?

A. It is in Washington, D. C., in the Surveyor General's Office.

(Testimony of James R. Wilcox.)

The Court: I happen to know there is an original on file in the Recorder's Office.

A. It is a print, isn't it?

The Court: Original.

A. Original tracing?

Mr. Johnson: If the Court please, may we have a few minutes recess while I get the Commissioner up?

The Court: Yes. The Court will be recessed for ten minutes.

(Whereupon, Court was recessed for ten minutes.)

Mr. Johnson: If the Court please, may I have leave to call the United States Commissioner and Recorder for a few minutes, in place of Mr. Wilcox?

The Court: Yes.

CLINTON B. STEWART

called as a witness on behalf of the Plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please? [18]

A. Clinton B. Stewart.

Q. And where do you live, Mr. Stewart?

A. Fairbanks, Alaska.

Q. What, if any, official position do you hold in the Fairbanks Precinct?

A. United States Commissioner for the Fair-

(Testimony of Clinton B. Stewart.)

banks Precinct and Recorder for the Fairbanks Recording District.

Q. As such, do you have in your possession, as the Recorder of the Fairbanks Recording District, do you have in your possession an official plat of the Town of Fairbanks? A. Yes.

Q. Do you have that plat with you?

A. Yes.

Clerk of Court: Plaintiffs' Identification Number "10".

Q. I will show you Plaintiffs' Identification Number "10", and ask you if that is the official plat of the Townsite of Fairbanks that appears in your records? A. Yes.

Q. And this Identification has the original recording stamp on it, does it? A. Yes.

Q. And this has been in the custody of your office since it was recorded, has it? A. Yes.

Q. So far as you know it is in the same condition now as it was when it was first recorded?

A. Yes.

Mr. Johnson: We will offer this in evidence, if the Court please.

Mr. Taylor: No objection.

The Court: It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "F".

(Plaintiffs' Identification "10" admitted in evidence as Plaintiffs' Exhibit "F".)

Mr. Johnson: Do you care to see it?

The Court: I have seen it.

(Testimony of Clinton B. Stewart.)

Mr. Johnson: Will the Court consider the Exhibit read?

The Court: Yes, indeed.

Mr. Johnson: You may cross-examine.

Mr. Taylor: No cross-examination.

Mr. Johnson: That is all.

(Whereupon, Mr. Clinton B. Stewart was excused as a witness and left the courtroom.)

Mr. Johnson: Now, I would like to recall Mr. Wilcox, if the Court please.

The Court: Very well.

JAMES WILCOX

having previously been duly sworn, resumed the stand for further Direct Examination. [20]

Direct Examination

(Continued)

By Mr. Johnson:

Q. You are James Wilcox, who previously had been sworn and testified in this case? A. Yes.

Q. Now, Mr. Wilcox, I will show you Plaintiffs' Exhibit "F", and will ask you if you recognize that as being an original map of the Townsite of Fairbanks?

A. This is the first time I have seen this one. It appears to be, though.

Q. Have you, in your office as City Engineer—do you have anything comparable to this?

A. Yes, that map that you have a copy of there.

(Testimony of James Wilcox.)

Q. Now, will you examine Plaintiffs' Identification "9", and particularly with reference to Lot 6 of Block 4, and Lot 6 of Block 4 as appears on Plaintiffs' Exhibit "F", and tell the Court whether or not the two maps coincide with reference to the size of the lot and the meander lines and directions and bearings and so on?

A. Lot 6 in Block 4?

Q. Yes, this is Lot 6 in Block 4, and this is Lot 6 in Block 4 (indicating).

A. This map (indicating), has more bearings on it than this one (indicating), but the dimensions match up. [21]

The Court: Just a minute, I can't tell what you mean by "this".

Mr. Johnson: Plaintiffs' Exhibit "F" has more bearings on it?

A. Yes, they have a bearing mark in the dividing line between Lot 6 and Lot 5 in Block 4.

The Court: Now, that is on which map?

Mr. Johnson: On the official map; our Exhibit "F".

The Court: On the exhibit?

A. Exhibit "F" has more bearings on it.

The Court: That is the old map?

A. The old map; yes.

Q. By "bearing", do you mean a directional bearing, bearing either way, from north and south?

A. Yes. That has one more, but the dimensions are all the same and the—all the rest of the sides

(Testimony of James Wilcox.)

have the same bearings and same dimensions. That would mean that the dimensions on this copy that I brought up, and the bearing on it would have to be the same as on the old map here.

Q. So that if it was left off here, it doesn't mean that it varies in any way from the original Exhibit "F"? A. No.

The Court: You could put that bearing in right now.

A. Yes.

Q. Would you put the bearing on Plaintiffs' Identification "9" [22] as it appears on Plaintiffs' Exhibit "F", the one that is missing?

The Court: Maybe you had better take it down to the table so you can get it better.

A. I can do it right here.

The Court: Just a minute, the meander lines of the river are the same on both maps?

A. They are.

Q. And the same bearings on the meander lines on the river appear on Plaintiffs' Exhibit "F" as they do on Plaintiffs' Identification "9"?

A. They do.

Q. So that now, with the addition of this bearing along the westerly line of the lot, which you have just placed on Plaintiffs' Identification "9", Plaintiffs' Identification "9" now, with reference to Lot 6 and Block 4, is exactly the same as it appears on Plaintiffs' Exhibit "F", is that correct? The two are now the same?

(Testimony of James Wilcox.)

A. Yes, sir, they are. There is a discrepancy in here between the total distance of the south boundary of Block 4. On the old map it is given 574.8 feet. On this copy I have it is 550.1 feet.

Q. Well, that is the overall distance of the block?

A. That is the overall distance of the block.

Q. I am talking now about Lot 6. Are the dimensions the same? [23]

A. Yes. And it is the same distance from the center line of Lacey Street to establish that one southwest corner.

Q. So that even if there may be a difference in the length of the block that is shown, Lot 6 is the same on both Plaintiffs' Exhibit "F" and Plaintiffs' Identification "9", is that correct?

A. Yes, sir.

Q. Now, Mr. Wilcox, the north boundary of Lot 6, as shown by Plaintiffs' Exhibit "F", do you know what that corresponds to, with relation to the Chena River?

A. According to the survey notes, it is the left meander line of the Chena River.

Q. Which constitutes the north boundary of Lot Number 6? A. Yes, that is right.

Q. As shown by Plaintiffs' Exhibit "F", and also now as shown by Plaintiffs' Identification "9", is that correct? A. That is correct.

Q. Do you have any questions? At this time, your Honor, I would like to offer in evidence Plaintiffs' Identification "9" as being a true and correct

(Testimony of James Wilcox.)

copy of the original plat, with reference to Lot 6 in Block 4.

Mr. Taylor: If the Court please, I am going to object to the admission of this as an exhibit for the reason it is not an exact copy of the official map. There is some meander lines on that one, and also the boundaries of the city on that [24] which are not shown on this map.

Mr. Johnson: I think the witness has testified, your Honor, that the—both maps coincide with reference to Lot 6 in Block 4.

The Court: Well, you have one map in, anyway. That is all you need. There is nothing about——
(interrupted)

Mr. Johnson: Well, the only purpose I had in mind was to try to get this back to the Recorder's office. It doesn't matter. It is in, so I am not concerned.

The Court: I will sustain the objection.

Q. I will show you Plaintiffs' Identification "3", Mr. Wilcox, and I will ask you to look at that, and can you compare that with Plaintiffs' Exhibit "F", with reference to Lot 6, and state whether the measurements there, as shown, coincide?

A. Well, this is omitted as a bearing between Lots 5 and 6 in Block 4, as were omitted on that other plat.

Q. Would you put in that bearing? Now, the original Lot 6 of Block 4 on Plaintiffs' Identification "3" corresponds exactly with Lot 6 of Block

(Testimony of James Wilcox.)

4 as shown on Plaintiffs' Exhibit "F", is that correct, with the addition of this bearing which you have put in?

A. No, you wouldn't be able to locate this Lot 6 from this plat that has been drawn up, because it is not tied into the street intersections here.

The Court: What is that, Mr. Wilcox? [25]

A. It is not tied to any definite location.

Q. Well, isn't this the location survey monument? (Indicating).

A. Yes, it is, but there is no measurement tie-up from this monument to this block. It would have to be tied in from this street intersection to this meander line (indicating).

Q. Where that bearing is in there (indicating)?

A. Yes, but there is no dimension. It would have to be this dimension. It is obviously the same location.

Mr. Johnson: Do you have any questions?

Mr. Taylor: No questions.

Mr. Johnson: That is all, Mr. Wilcox. Thank you very much.

(Whereupon, Mr. James Wilcox was excused as a witness and left the witness stand.)

Mr. Johnson: I would like to recall Mr. Nordale.

A. H. NORDALE

having previously been duly sworn as a witness, resumed the stand for further direct examination.

Direct Examination

(Continued)

By Mr. Johnson:

Q. Your name is A. H. Nordale, and you have been previously sworn and testified in this case, is that correct? A. I have.

Q. Now, Mr. Nordale, you say you recall when there was a saw [26] mill on Lot 6 in Block 4 of the Townsite of Fairbanks, is that correct?

A. I do.

Q. Do you know who operated that saw mill?

A. Carroll and Parker.

Q. And do you recall how the Chena River—or the channel of the Chena River behind Lot 6—ran at the time the saw mill was there?

A. The saw mill was on a cut bank and there was an eddy behind it.

Q. Now, will you look at Plaintiffs' Exhibit "F" and with reference to Lot 6 in Block 4, can you indicate on this map where the saw mill was located, and where this eddy was that you speak of?

A. The saw mill was in this area in here (indicating).

The Court: Don't say that. I can't see what you are talking about.

Mr. Johnson: He is indicating the east portion

(Testimony of A. H. Nordale.)

of Lot 6, along the edge of Lacey Street, is that correct?

A. That is correct.

Q. And where was the eddy that you speak of?

A. The eddy was due north of the mill site.

Q. Well, did the river at that time come right up to the back end of the saw mill?

A. Yes. The eddy was used as a mill pond at the time. [27]

Q. Is that in this bend of the Chena that is indicated on the map just east of Lot 6? Was the eddy——?

A. No, the eddy extended back, westerly through Lot 6—Lot 5 and 4, at that time. The channel was——(interrupted)

Q. Then just directly north——?

A. Of the mill.

Q. Of Lot 6 and the mill?

A. They had the drag, or whatever they used to bring the logs out.

Q. Was that an incline?

A. That was an incline; yes.

Q. A slip of some sort? A. Yes.

Q. Where was that located with reference to the north end of the lot?

A. Well, it extended from the water up into the mill.

Q. On the north end?

A. On the north end.

Q. And the water at that time came right up to the north end of the lot, is that correct?

(Testimony of A. H. Nordale.)

A. What would be the meander line here (indicating).

Q. And this slip or incline, what was that used for? A. Bringing up logs to the saw.

Q. From the——?

A. From the mill pond. [28]

Q. Now, after the mill was removed—or rather, first, do you know whether or not the Carroll and Parker had any difficulty with silt or sand gathering in their mill pond?

A. That only by hearsay.

Q. You don't know anything about it?

A. No, I don't.

Q. All right. Now, after the mill was removed, when did—when was this building built that you mentioned awhile ago, do you recall, about?

A. I can't give you a definite date.

Q. But it was sometime——?

A. It was about 1906.

Q. All right, and that building is the present building that is now situated on the lot, is that correct? A. Yes.

Q. And your best estimate is that that building is about 85 or 90 feet long and about 50 feet wide?

A. Umhummm.

Q. And that has always been that long, is that correct, from the time it was first placed there?

A. That is right.

Q. Now, when it was first built, how was the

(Testimony of A. H. Nordale.)

north end of the building constructed? Was it built on land, or what?

A. The foundation was piling.

Q. And then, first, the water came right up to the north end [29] of that building, is that correct?

A. It came up to it; yes.

Q. During the interim from the time the saw mill was built and until the building was built, the bank on the north side of the—or, rather, on the north side of this lot, the Chena Bank had been building up during those years, had it not?

A. That is correct.

Q. And can you describe over the period of years what the action of the Chena River has been, with reference to the changing in the channel just north of the—this Lot 6 in Block 4?

A. During the years after 1908—that is when we had been absent from Fairbanks for some time—we returned in 1908 and reconstructed a hotel on Lot 4. The river was cutting away on the north bank on what would be the south boundary of of Slaterville. At that time there was a farm—chicken houses and green houses and so forth on the bank of the river. A Mrs. Anderson, I believe, was the owner of the green house and buildings, and the bank cut through there and that side is now in the channel. It continued to deposit soil—
(interrupted)

Mr. Taylor: Just a moment, Mr. Nordale. I

(Testimony of A. H. Nordale.)

object. Where was Mrs. Anderson's green house and chicken house? Which side?

A. It would be on the south bank of the river—that is, [30] it would be on the north bank of the river along Slaterville. It would be on the Slaterville boundary.

Q. The south boundary of Slaterville?

A. South boundary of Slaterville.

Q. You say at that time this chicken house or greenhouse was located in what is now at the present time, part of the channel of the river?

A. That is correct.

Q. So that over the period of years the channel has moved from the south—away from the south bank to the north bank of the river, is that correct?

A. It has been cutting in there consistently; yes.

Q. And that has been building up on the south bank, on the north boundary of Lot 6?

A. That is correct.

Q. Now, during the years has the Town of Fairbanks experienced high water and floods in the Chena?

A. Many times during those years, particularly before the dyke was put in up at——(interrupted)

Q. At the Tanana River, along the Tanana?

A. Yes.

Q. Before that, the Town of Fairbanks experienced many floods, is that correct?

(Testimony of A. H. Nordale.)

A. That is correct.

Q. Would those floods come more than one time in a year? [31]

A. Quite often twice a year. We would have a break-up flood.

Q. When would that come about?

A. Whenever the ice broke. Sometimes there would be a jam in the ice.

Q. Just speaking generally, what time of year?

A. Late in April, early in May. Approximately from the 20th of April to the 12th of May.

Q. Depending on when the ice broke up?

A. Correct.

Q. And you usually had a flood then, is that right?

A. Not always, no, but in the case of an ice jam we had a flood.

Q. Now, these floods would cause the water to rise considerably, is that correct? A. Yes.

Q. And when the waters receded, was any alluvian deposit remaining after the flood?

A. There was.

Q. Is that the part of the way in which the north end of Lot 6 has been building up over the period of years? A. That is.

Q. Do you recall, you said that sometimes you had floods other times of the year. When were they? What time of the year would that be, about?

A. During the summer whenever we had heavy rains and the Chena River, or the Tanana would

(Testimony of A. H. Nordale.)

reach high stages, we would have a flood stage of the Chena River.

Q. And would the same action take place, that is, after the waters had receded would there be some deposit of alluvial soil from the flood?

A. There would.

Q. And in addition to that, you say that the channel of the Chena River has gradually moved from south to north? A. Yes.

Q. So that the south bank of the Chena River has been building up and the north bank has been cutting away, is that correct, right near, with reference to Lot 6, at any rate?

A. That would be referred to as the right bank and the left bank.

Q. I guess I am not using the right terms, but looking down stream?

A. The right bank has been eroding.

Q. And the left bank?

A. The left bank has been building up.

Q. And the left bank borders on Lot 6, is that correct? A. That is correct.

Q. Now, during the years have you or your father—that is, you and your brother, as trustees, and your father before you, have you had possession of all of Lot 6 and the accretions [33] during——(interrupted)

Mr. Taylor: If the Court please, I believe that calls for a conclusion of law. I am going to object. No testimony there has been any accretion.

(Testimony of A. H. Nordale.)

The Court: I will sustain the objection.

Q. What, if anything, did you, as trustee, and your brother, as co-trustee, what have you done with reference to Lot 6 since it has been in your hands under the Nordale Estate Trust?

A. We have maintained the lot.

Q. Have you rented the building that is on the lot?

A. We have.

Q. And has that been rented most of the time?

A. It has.

Q. Have you rented or have you paid the taxes on the lot?

A. We have.

Q. Have you—what else, if anything, have you done with respect to the north end of this lot?

A. Kept it clear, maintained it physically.

Q. When you say you kept it clear—

A. Cleared of brush and—(interrupted)

Q. Can you refer to some specific instance of that?

A. Yes. In the Fall of 1945, I had the brush removed. At that time—(interrupted)

Q. Explain the brush that was there at the time.

A. There was a dense growth of cottonwood and willow and so forth on the lot, to the river.

Q. Down the river?

A. To the river, and I was in the City Administration at the time and we discussed the lot. The city had decided at that time to clear brush out all along the river, because it was harboring an

(Testimony of A. H. Nordale.)

element that was using these highways for important purposes.

Q. That is, the brush was?

A. The brush was, and at the time I did not wish to remove the brush because it made the whole site less unsightly with the brush, but we decided to remove it so I instructed Mr. Wehner to clear it. I worked with the street committee, and we decided to clear the ground, which included brush on the play field and so forth.

Q. Now, when you say you instructed Mr. Wehner to do that, at whose expense was that?

A. At my expense.

Q. You paid the city for the use of their equipment and men to——?

A. That is correct.

Q. And have you a canceled check showing that payment?

A. I have.

Q. Will you produce it, please? Did you retain the city, or did you retain Mr. Wehner to do this cleaning? [35]

A. The city was doing all of the cleaning at the time. Mr. Wehner was working for the city, was handling prisoners and so forth, so it was handled by the chairman of the street committee, Mr. Phillips.

Q. But Mr. Wehner did the work and received the pay for it?

A. It was the policy of the city for Mr. Wehner to bill—to bill the property owner for the services and remunerate the city for the portion that was

(Testimony of A. H. Nordale.)

performed by the city. Mr. Wehner also performed part of the services, personally, as a—as his own business enterprise.

Mr. Johnson: I ask that be marked.

A. (Continued): Removed garbage, and so forth.

Clerk of Court: Plaintiffs' Identification Number "11". Plaintiffs' Identification Number "12".

(Plaintiffs' Identifications Numbers "11" and "12" marked.)

Q. I will show you Plaintiffs' Identification Number "11", and I will ask you to tell the Court what that is?

A. Number "11", is a trade-off—Wehner's invoice which includes 5 hours of labor for seven men who were municipal prisoners, and Number "12", is the—oh, that is all Number "11". And the attached record is the city's receipt for the labor, signed by Mr. Fisher.

Q. And Number "12", can you tell what that is?

A. Is the check in payment for the invoice. [36]

Q. By whom is the check signed?

A. By myself, as trustee.

Q. And on whom is it drawn?

A. On the First National Bank of Fairbanks to the payment of Adolph Wehner.

Q. For how much money? A. \$47.50.

Q. And it is drawn against the account of the Nordale Estate Trust? A. It was.

(Testimony of A. H. Nordale.)

Mr. Johnson: We will offer Plaintiffs' Identification "11" and "12", if the Court please.

Mr. Taylor: Object, your Honor, upon the grounds it is incompetent, irrelevant and immaterial. Have no probative value on the issues.

Mr. Johnson: If the Court please, they indicate——(interrupted)

The Court: I think they constitute mere memoranda upon which he can make his oral testimony. It is not admissible on the part of the plaintiff.

Q. Well, Mr. Nordale, I take it then that in 1945 or '6 you expended the sum of \$47.50 to have the trees and brush cleared off the north end of Lot 6, is that right?

A. And any rubbish that had accumulated.

The Court: How much land was there by that time? [37] How much land on the north end of the lot?

Q. Do you know how far the lot extended at that time?

A. It extended about to the present boundary of the lot. I can't give it to you in feet. It is just about the same as the boundaries shown on the map. There may have been some subsequent accretion.

Q. I will show you Plaintiffs' Identification "3", and can you tell from that about what the boundaries of the lot were at the time you cleared the brush?

A. Approximately 219.19 feet on the west bound-

(Testimony of A. H. Nordale.)

dary, and approximately 308 feet on the east boundary.

Mr. Taylor: Just a moment.

Q. And the lot is about the same now as it was at that time? A. About the same.

Q. How far back from the Chena River did these trees and willows and cottonwoods, or whatever it was, extend?

A. They extended to the rear of the buildings on the lot. What we refer to as the Malone Buildings.

Q. That is the present building that is on?

A. Present building.

Q. So that all of the north portion of the lot north of the building was covered with trees and willows, is that correct? A. That is correct.

Q. And you had all of those removed?

A. That is correct. [38]

Q. Now, sometime previously did you or the Nordale Estate Trust permit the city to construct a little drainage ditch across the north portion of Lot 6?

Mr. Taylor: Just a moment, I object to the question, your Honor, as not proper—proper foundation hasn't been laid on it. Previous to what? I also believe that the answer, even if it was "yes" or "no", would still be incompetent, irrelevant and immaterial.

Mr. Johnson: I think, your Honor, he has a right to show what, if anything, he has done with

(Testimony of A. H. Nordale.)

the lot since they have had it and if they have permitted the city to build a drainage ditch, it seems to me that is perfectly competent.

Mr. Taylor: He said "prior to," but he didn't say prior to what.

The Court: I don't know. Over what part of the lot?

Mr. Johnson: Over any part of Lot 6.

The Court: I don't think there is any dispute about Lot 6 as defined by its original boundaries.

Mr. Johnson: Well, over the portion of Lot 6 lying north of the building—of the present building? A. Yes.

Q. And how long ago was that ditch built, do you remember?

A. As far back as I can remember, from time to time new ditches were put there with the consent of the property owner. The ditches, at times, crossed the existing lot and [39] went beside it—followed down beside the east boundary of the building, too. There was a ditch in there to drain First Street.

Q. Along the edge of Lacey Street?

A. Along the edge of Lacey Street, and also through the lot we permitted a ditch through the lot to drain pools on First Street.

Q. Now, do you remember whether or not the Chena River, or the waters in the Chena River, became clouded and muddy after they began mining up on Fairbanks Creek?

(Testimony of A. H. Nordale.)

A. No, I don't. I don't recall that.

Q. Now, Mr. Nordale, when, if ever, did you have any discussion with either of the defendants with reference to the north part of Lot 6? That is, the part of Lot 6 lying north of the present building, of the building that was on there. Did you have any talk with either of the defendants about it? A. I did.

Q. Which one did you talk to?

A. Mr. Birkliid.

Q. And where did that conversation take place?

A. In my office.

Q. In the Nordale Hotel?

A. In the Nordale Hotel.

Q. And who was present? [40]

A. Mr. Birkliid, only, and myself.

Q. Now, will you explain to the Court what was said with reference to the north portion of Lot 6, lying north of the building?

Mr. Taylor: I am going to object to any further conversation until the time is established, whether it was before or after——(interrupted)

Mr. Johnson: Very well.

Q. When did that conversation take place? I am sorry I overlooked that. Do you remember?

A. It would have been in late February or early March of 1948.

Q. Was that before?

A. It was probably during the month of March.

Q. Was that before the defendants had made

(Testimony of A. H. Nordale.)

any attempt to take possession of the part of Lot 6?

A. It was.

Q. Now, will you explain to the Court what was said by you and by Mr. Birklid?

Mr. Taylor: If the Court please, I am going to object to the testimony as to what was said between the defendants and the witness in this case because it won't go to prove any title to that particular part of the ground in Mr. Nordale or in the Trustee. I think anything Mr. Nordale would say at that time would be self-serving. [41]

Mr. Johnson: I am not concerned with what Mr. Nordale said, I am concerned with what Mr. Birklid said concerning this property and I think it is perfectly competent.

Mr. Taylor: What Mr. Birklid would say would be no proof of the ownership of the part of the land lying north of Lot 6 Block 4.

The Court: Well, of course I can't anticipate what the testimony would be. I don't know what the relevancy would be. I will permit the question and you can move to strike it if it proves irrelevant.

Q. Will you explain this conversation that you had?

A. Mr. Birklid called at my office and wanted to lease a portion of that lot—the north portion.

Mr. Taylor: If the Court please, I am going to object to the question and ask the same be stricken out, not competent, relevant or material.

(Testimony of A. H. Nordale.)

It does not go to prove any of the issues in the Complaint.

Mr. Johnson: No, but it tends to show the defendants had knowledge that this was property belonging to the Nordale Estate and treated it as such when they attempted to lease it.

The Court: Well, it might possibly be relevant in rebuttal, but I can't see where it is now. Did you move to strike that?

Mr. Taylor: Yes, your Honor.

The Court: Very well, I will strike it. [42]

Mr. Johnson: Very well.

Q. I will show you Plaintiffs' Identification "1", Mr. Nordale, and will ask you if you have ever seen that before? A. I have.

Q. Now, that purports to be a photograph taken in 1905, according to the information on the front of there. You were in Fairbanks at that time, were you?

A. No, I wasn't. I left there a month previously to go to Cleary City. I had gone to Cleary City.

Q. Had you been in Fairbanks any time during the year 1905?

A. I lived in Fairbanks until May 5, 1905.

Q. That was about a month before this was taken?

A. This was taken on June 13, the date on the print.

Q. Now, do you recognize the subject matter of that picture? A. I do.

(Testimony of A. H. Nordale.)

Q. Is that a true and correct representation of the subject matter as you recall it at the time?

A. It does.

Q. Does that show—that picture show the saw mill that was on Lot 6 at that time?

A. It does.

Q. Is that saw mill indicated in any way there?

A. By a cross.

Q. Pen and ink cross?

A. Pen and ink cross. [43]

Q. Now, I will show you Plaintiffs' Identification "2", and will ask you if you have ever seen that before? A. I have.

Q. And what does that purport to be, if you know?

A. That shows the left bank of the river, including the buildings on Lot 6.

Q. At what time?

A. That was in October of 1915.

Q. Were you living here in Fairbanks at that time?

A. No, I left Fairbanks a month previously to attend the University.

Q. Well, does it—at the time you left, did the left bank of the river as it appears on that photograph—was that the same as it appears?

A. It was the same; yes. The water was probably higher, a little higher, but the bank was the same.

Q. You say that it shows the building on Lot 6?

(Testimony of A. H. Nordale.)

A. It does.

Q. Now, can you tell—is that building indicated in any way on that? A. By an inked cross.

Q. Now, along the side of the building there appears to be some sort of a pipe line. Do you know anything about that?

A. That was a pipe line installed by the Fairbanks Laundry Company to take water out of the river. [44]

Q. And what, if anything, do you recall about that pipe line from year to year?

A. It required extensions from time to time as the bank kept creeping to the north.

Q. As the river channel changed from the south to the north, it had to be lengthened?

A. Yes.

Q. Was that done every year, do you know?

A. I know I wouldn't swear to that. I know I had seen it done several times.

Q. You had seen them lengthen the pipe?

A. I have.

Q. Did the Chena River flood this past year?

A. A year ago.

Q. I mean in 1948? A. Yes.

Q. Did it flood after the defendants had moved a building onto the rear portion, or the north portion of Lot 6? A. It did.

Q. Do you recall how high the water was, or did it come up around the building that the defendants had placed on that property?

(Testimony of A. H. Nordale.)

A. It did. It surrounded the buildings.

Clerk of Court: Plaintiffs' Identification Number "12". Oh, I beg your pardon, Number "13". Plaintiffs' Identification [45] Number "14".

(Plaintiffs' Identification Numbers "13" and "14" marked.)

Q. I will show you Plaintiffs' Identification Number "13", and ask you what that is, if you know?

A. That is a picture of First Avenue.

Q. Looking in what direction?

A. Looking west.

Q. And with reference to Lot 6, Block 4, where would——

A. It shows the street in front of Lot 6.

Q. It shows the street in front of Lot 6, Block 4? It doesn't show the buildings on it?

A. No, it doesn't. It shows the buildings on Lots 5 and 4.

Q. But that was taken right in front—it does show the street in front of Lot 6? A. It does.

Q. By whom was that picture taken?

A. By myself.

Q. And when was it taken? A. 1911.

Q. Was that during a flood? A. Yes.

Q. And the waters appearing there was the waters of the Chena? A. Chena and Tanana.

Q. During flood stage? A. Umhummm.

Q. What time of year was that, could you remember?

(Testimony of A. H. Nordale.)

A. Break-up time. Probably in May. Early May. I don't recall the date of the break-up.

Mr. Johnson: We will offer Plaintiffs' Identification "13".

Mr. Taylor: I object, your Honor, upon the grounds it is incompetent, irrelevant and immaterial. Has no bearing upon the issues now before the Court. It shows the condition that existed some place other than the location of the property which is in question here, and it also—the picture was made after the defendants entered upon the ground back of Lot 6 of Block 4.

Mr. Johnson: If the Court please, it shows—it corroborates the testimony of the plaintiff in that the flood conditions were affecting this property; in that particular year it went clear up to—covered First Avenue.

The Court: Well, isn't accretion deposits made gradually and imperceptibly? Isn't that what it is? Not suddenly by flood?

Mr. Johnson: It can be deposited in any manner. Floods help to deposit it. It can be gradual and imperceptible, but the deposit by alluvial flood waters are a part of the way.

The Court: All right, objection sustained. [47]

Q. I will show you Plaintiffs' Identification "14", and will ask you to tell the Court what that is, if you know?

A. That is a picture showing Lots 4, 5 and 6 during the year 1907.

(Testimony of A. H. Nordale.)

Q. Was that taken—what side of the river was that taken from?

A. It was taken from the right bank of the river, looking towards the south.

Q. And does it show the present building that is now on Lot 6?

A. It shows the first half of the building, or the portion that was constructed first. There were two portions of the building, but one was constructed before the other.

Q. Were you in Fairbanks at the time?

A. No. That picture was given me by a man with whom I was employed as a photographer. Albert Johnson. It was taken by Mr. Johnson.

Q. You weren't here at the time?

A. I was on Cleary.

Q. How long had you been on Cleary?

A. Three years, with intermittent trips to town.

Q. Did you come into town from time to time?

A. I was in town in 1907, but I wouldn't recall the date. I wouldn't say I was in town during the time this was made.

Q. Does this purport to represent a true and correct picture of the conditions at that time, as far as you know?

A. That is correct. [48]

Mr. Taylor: I object on the grounds he testified he wasn't here and wouldn't know at that time.

Mr. Johnson: I haven't offered it yet, your Honor.

(Testimony of A. H. Nordale.)

The Court: Well, I will strike. It may be stricken.

Q. Mr. Nordale, prior to the time that the defendants moved into this lot, what, if anything, had you done with respect to selling?

A. I had listed it for sale.

Mr. Taylor: If the Court please, I am going to move to strike the answer upon the grounds it is immaterial and irrelevant and incompetent, and also has no bearing upon the ground. The property you are claiming you might not have a title to.

The Court: Motion granted. It may be stricken.

Q. What, in your opinion, is the reasonable value of the property that is now occupied by the defendants?

Mr. Taylor: If the Court please, we object to the question upon the grounds the witness has not been properly qualified to state what the reasonable rental would be.

The Court: You can show his qualifications.

Q. Well, Mr. Nordale, you now rent a portion of Lot 6 in Block 4, do you? A. I do.

Q. What part of Lot 6 in Block 4 do you rent?

A. I rent the two buildings that comprise the Malone property [49] and the little warehouse.

Q. Next to it?

A. Near it—over near the Sani-System Cleaners, I believe.

Q. What is the rental that you derive from those two buildings?

(Testimony of A. H. Nordale.)

A. From the three I derive \$185.00.

The Court: What period of time?

A. Per month.

Q. And are you familiar with the rental value of vacant property—that is, ground rental values in Fairbanks, generally? A. Generally, yes.

Q. And the portion of Lot 6 in Block 4, which has been taken over, or which has been occupied by the defendants, what, in your opinion, would be a reasonable rental value of that property?

Mr. Taylor: If the Court please, I object to the question on the ground there is no proof that the land lying to the north of Block 6, or Lot 6 of Block 4 is a part of Lot 6. It is assuming something that has not been proven.

The Court: Objection overruled.

A. \$150.00.

Q. A month? A. Per month.

Mr. Johnson: I believe that it has been admitted, your Honor, that the defendants were requested to vacate and that they refused to do so. I don't believe that it is necessary to [50] offer any proof on that.

The Court: Nothing that has been admitted has to be proved.

Mr. Johnson: You may cross-examine. Well, it is almost 12:00 o'clock. You may cross-examine.

Mr. Taylor: If the Court please, I have quite a long examination. I wonder if we might recess until 2:00 o'clock?

(Testimony of A. H. Nordale.)

The Court: Well, maybe so. I would like to ask Mr. Nordale a question.

Examination By the Court

By Judge Pratt:

Q. To what height did the ground fill in to the north of your Lot 6?

A. Your Honor, I don't know what depth the water was, originally.

Q. Comparing the level of the ground at the south end of your lot, comparing the filling in with the height of that same gauge?

A. The south end, I imagine, I believe it filled in about 8 or 10 feet. Eight feet, probably, and then it has filled in——(interrupted)

Q. What I want to know is, is it much lower than the south end of the lot—the north part that is filled in, how much lower or how much higher is the ground surface that has filled in? [51]

A. It is lower. The ground surface that is filled in is lower.

Q. How much lower?

A. Eight feet, about, ten feet. That is an estimate.

Q. It is still above the water in ordinary high water mark?

A. Yes. The upper is not above the extra high water mark. The ground, where the buildings rest, can be flooded by high water.

Q. Ordinary high water?

(Testimony of A. H. Nordale.)

A. No. No. It wouldn't be flooded by ordinary high water. The ground to the north of the river bank normally isn't flooded by an ordinary stage of water at the present time.

Q. That is what I wanted to know.

Questions by Mr. Johnson:

Q. The present meander line of the Chena is along the north edge of this present—of Lot 6, is not flooded except in unusually high water, is that correct?

A. Stages of high water, that is right.

Q. But there is a gradual slope from the north end of the lot, I mean from the south end of the lot to the north end of the lot, gradually sloping downward?

A. No, I would say it is probably somewhat opposite. I believe that the bank is probably a little higher on the north end than it is next to the building.

Q. What I am talking about now is about the south—I believe [52] the Court asked you how much, if any, it sloped from the south boundary of the lot right along the edge of First Avenue, back to the river and over all it is—is it a gradual slope or does it?

A. No, there is a precipitous jog right near the end of the buildings.

Q. Then there is a depression in there?

A. There is a depression in there. The silt has

(Testimony of A. H. Nordale.)

not deposited in there as fast as it has farther out to the north.

Q. Up to the meander line?

A. That is correct.

Q. So that the north portion of Lot 6 is slightly higher than the depression immediately at the rear of the building?

A. That is as I recall it. There is a little depression to the rear of the building that hasn't filled in as rapidly as it has farther north.

Mr. Johnson: That is all.

The Court: Take a recess until 2:00.

(Whereupon, at 11:53 o'clock a.m., Court was recessed until 2:00 o'clock p.m.)

Be It Remembered, that at 2:00 o'clock p.m., the trial of the above-entitled cause was continued, the parties above-mentioned again appearing in court in person and by their attorneys of record; the Honorable Harry E. Pratt, District Judge, [53] presiding;

And Thereupon, the following proceedings were had:

The Court: Counsel ready to proceed with Nordale vs. Waxberg?

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. Taylor: The defendant is ready.

Mr. Johnson: If the Court please, at the recess at noon Mr. Nordale was on the stand and ready for cross-examination. Before he continues, I would

like leave to call Mr. Lee Linck for some testimony that won't take very long, and I believe counsel has no objections.

Mr. Taylor: I have no objections.

The Court: Very well.

Mr. Johnson: Mr. Lee Linck.

LEE LINCK

called as a witness on behalf of the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. Lee S. Linck.

Q. And where do you reside, Mr. Linck?

A. Fairbanks.

Q. Are you engaged in business in Fairbanks?

A. Yes. [54]

Q. What is the nature of that business?

A. Civil Engineering.

Q. Do you operate the business known as the Alaska Architectural and Engineering Company?

A. Yes, I do.

Q. Are you familiar with property known as Lot 6, Block 4 of the Townsite of Fairbanks?

A. Yes.

Q. Did you have occasion last Spring, I believe, in April of 1948, to make a survey of that property at the request of Mr. Nordale?

A. Yes, I did.

(Testimony of Lee Linck.)

Q. And as a result of that survey did you prepare a plat? A. Yes.

Q. I will show you Plaintiffs' Identification "3" and will ask you what that is, if you know?

A. This is a plat of the A. H. Nordale property in Lot 6, Block 4 of the Fairbanks Townsite.

The Court: Give him the loudspeaker, Mr. Clerk.

A. This is a plat of the A. H. Nordale property, Lot 6, Block 4, Fairbanks Townsite, as we surveyed it in April, 1948.

Q. And does that plat show the original meander line of the Chena Slough?

The Court: Chena Slough? [55]

Mr. Johnson: Chena River, excuse me.

Q. Of the Chena River as it appears on the official plat of the Townsite of Fairbanks?

A. Yes, it does.

Q. Does it—does that plat show the extension beyond the meander line as shown by the original plat of the Town of Fairbanks and to the present meander line of the Chena River?

A. Yes, it does.

Q. Does it show the distances on the metes and bounds, or rather—strike that out. Does it show—that plat show the metes and bounds of the property known as Lot 6 in Block 4, as it now appears and extends to the present meander line of the Chena River?

Mr. Taylor: Just a moment, I am going to ob-

(Testimony of Lee Linck.)

ject to the question, your Honor, because of no testimony that Lot 6, Block 4, does extend to the Chena River.

The Court: I don't think there is any evidence showing where the meander line was. I will sustain the objection.

Q. The line on this plat marked in pencil "A" and "B", is that—what does that line indicate on the plat?

A. That indicates the original meander line as indicated on the official plat of the Fairbanks Townsite.

Q. Now, is the present meander line of the Chena River indicated on that plat, also?

A. It approximately—(interrupted) [56]

The Court: How did he determine what was the meander line?

Q. How did you determine—place the original meander line, as shown by the official Town of Fairbanks on that map?

A. We, in making this survey—the line indicated there as a dotted line indicates the approximate meander line—present meander line of the river.

Q. And what did you—from what did you—or what did you use as a basis for determining the present meander line, or the approximate present meander line?

A. It is a point at which vegetation is present,

(Testimony of Lee Linck.)

and also the point at which there is a sharp break in the bank of the river.

Q. Showing where the water?

A. Between—that is incorrect. We established that merely as a bank line of the river, and it is the point at which there is indications of vegetation.

Q. So that the point used is above the normal water level of the river, is that correct? Slightly above?

A. Above the mean water level.

Q. Above the water level of the river. Did you make that survey—in making that survey did you use any established survey monument, as a point of beginning?

A. Yes, we did.

Q. What is that monument? [57]

A. That is the street intersection which is the center line of First and Lacey Streets.

Q. Is there an established monument there?

A. There is a City Survey Monument there, and also one at the intersection of Second Avenue and Lacey Streets and those were the two monuments which we used to begin the survey.

Q. And they are established monuments, are they?

A. Yes, they are.

Q. Do they—I will show you Plaintiffs' Exhibit "F" and I will ask you to look at this portion here (indicating), known—that is marked Lot 6 in Block 4, and will ask you if the survey monuments which you used appeared on Plaintiffs' Exhibit "F", if you can tell?

(Testimony of Lee Linck.)

A. Yes. I believe this is—that is S.I. 9 and S.I.—Street Intersection—36.

Q. And they are the two survey monuments which you used to begin your survey as shown by Plaintiffs' Identification "3", is that correct?

A. That is correct.

The Court: Will you hold that speaker up a little?

A. That is correct.

Q. Now, what, if anything else, is indicated within the boundaries of the property which is marked here Lot 6 in Block 4. There are certain outlines in dotted lines. Can you explain [58] what they are?

A. Yes. The dotted line in the southwest corner of Lot 6 is the building which is—which now occupies that space. I believe it is the Economy Store is now located in that building.

Q. And that dotted line shows the outline?

A. It indicates the outline of that building. And the dotted line on the southwest quarter of Lot 6 indicates the building adjacent to the other building and facing First Street.

Q. Now there is another dotted line outlined just north of the Economy Store building. What is that, if you know?

A. That indicates the outline of the building occupied by Birkliid and Waxberg.

Q. And did you indicate on this plat the portion of the property in question which has been occupied

(Testimony of Lee Linck.)

or located by Waxberg and Birklid, the Defendants, in accordance with their location notice?

A. Yes, we have. It is indicated in — by a hatched line on this map.

Q. And that follows around the metes and bounds description as given in their location notice?

A. Yes, it does.

Q. And by a “hatched line,” you mean diagonal marks along the inside of the area is indicated, is that right? [59]

A. That is correct.

Q. Now, is this plat, Plaintiffs’ Exhibit “3,” a true and correct plat of the area involved as indicated from your survey or indicated by your survey?

A. Yes, it is.

Q. Did you make this survey yourself, personally?

A. Yes.

Q. And did you prepare this plat personally?

A. Yes.

Mr. Johnson: We would like, now, your Honor, to offer Plaintiffs’ Identification “3.”

Mr. Taylor: No objection.

The Court: It may be admitted.

Clerk of Court: Plaintiffs’ Exhibit “G.”

(Plaintiffs’ Identification “3” admitted in evidence as Plaintiffs’ Exhibit “G.”)

Mr. Johnson: You may cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Mr. Linck, calling your attention to Plain-

(Testimony of Lee Linck.)

tiffs' Exhibit "F," would you state whether or not you know what the dotted line at the north boundary of Lot 6 of Block 4 represents?

A. I would say that it represents the city boundary, according to this survey. The north city boundary.

Q. Now, could you state whether or not you know what the solid [60] black line that lies north of the dotted line—what that would represent?

A. It appears to indicate the water line of the Chena River.

Q. Would that be the—would that correspond with the line you said was where the bank broke down—the crest of the bank?

A. That symbol is used to indicate the bank line of the river, but not necessarily an abrupt break.

Q. Well, wouldn't this show more or less of an abrupt break, due to the fact you have these other smaller lines to indicate the beach—more or less what you would call the beach?

A. Well, that particular symbol is used to indicate the bank of the river and unless it is definitely stated whether it is mean high or mean low water line, it is difficult to state.

Q. Does this map have any legend on here that would indicate that?

A. No, not that I know of.

Q. Have you made an examination of this map?

A. This is the original map? The official city

(Testimony of Lee Linck.)

Fairbanks Townsite map has no legend on that indicating that.

Q. I take it, then, the dotted line is the property line, is that right? The city limit line?

A. Yes, that is the boundary.

Q. Then your next line would be the crest of the bank of the [61] Chena Slough in 1909?

A. Yes.

The Court: May I see it, Mr. Taylor.

Q. Calling your attention to Plaintiffs' Exhibit "G," did you make a contour map of the land lying north of Lot 6 of Block 4? A. No.

Q. Did you run any levels on that so that you could state positively the difference in elevation between this building which you have identified as the Nordale Building, and the Waxberg building?

A. No.

Q. And could you state what the difference in elevation is between the back of the Nordale Building and the meander line or the bank line, as you call it, of the Chena River? A. No.

Q. Now, you spoke of vegetation on the bank of the river. What kind of vegetation was that?

A. Willows and grass.

Q. How big were those willows?

A. I don't recall off-hand, but they weren't very large.

Q. Two or three inches in diameter?

A. No, not over an inch.

(Testimony of Lee Linck.)

Q. And where were they in relation to the river bank?

A. Well, some were located very near the dotted line that [62] we have indicated on that map.

Q. Now, also calling your attention to—now this is a building which is known as the Nordale building. Could you state whether or not that this part of the lot upon which that building is located, is higher or lower than the Birklid and Waxberg building?

A. What do you mean by building? You mean the floor level?

Q. Yes, the floor level, or the contour of the land. Is it lower in here near the Nordale building, or is it lower here near the Waxberg building?

A. That is difficult to state. There is a low section just between the two buildings.

Q. And could you state what is the difference in elevation of the ground immediately in front of the Waxberg building facing on Lacey and Lacey Street, itself?

A. No, I couldn't.

Q. You paid no particular attention to that?

A. No.

Q. In your recollection would you say that it is about the same elevation?

A. No, the ground directly in front of the building is lower than near the intersection of Lacey and First Streets.

Q. How much lower?

A. I wouldn't say.

Q. Now, when you surveyed this did you find

(Testimony of Lee Linck.)

any old stakes, [63] Mr. Linck, on either one of the corners? A. No.

Q. No location? A. No.

Mr. Taylor: That is all.

The Court: Just a minute. Let me have the map, will you?

Examination by the Court

By Judge Pratt:

Q. Mr. Linck, did you chain from the corners of Lot 6 on out to your point number 2 on the river bank? Did you chain that? A. Yes, we did.

Q. And was it 308 feet, as shown by the map here? A. Yes, it was.

Q. And then for instance, then did you go along and determine the meander line of the river on down to corner number 3, or how did you determine that?

A. We located corner number 3 and where we indicated by a dotted line the approximate bank line between those two posts.

Q. And how far was it from the southwest corner of Lot 6 up to the corner number 3? The same as—— A. As indicated on the map.

Q. 209.19? [64]

A. If that is what is indicated on the map; yes.

Q. Was it—did you walk along the meander line between corners 2 and 3? A. Yes.

Q. Along the river bank and that seemed to you like a correct meander line, did it? A. Yes.

Q. Shown by the hatched line?

(Testimony of Lee Linck.)

A. (Witness nodded.)

Q. And that is the correct distance for that line, is it, as shown on the map? A. Yes, that is.

Q. Is it drawn to scale, the scale that you mentioned? A. Yes, it is.

Q. Well, is this lot that you surveyed beyond the original boundaries of Lot 6, is that above or below the water line of the Chena River? Is it filled with water or with land now?

A. It is covered with land.

The Court: I guess that is all.

Mr. Johnson: Did you want——

Mr. Taylor: No further cross-examination.

Redirect Examination

By Mr. Johnson:

Q. Did you make up a metes and bounds description of the area [65] which was surveyed on the basis of your survey? A. Yes, we did.

Clerk of Court: Plaintiffs' Identification Number "15."

(Plaintiffs' Identification Number "15," marked.)

Q. I will show you Plaintiffs' Identification "15," and I will ask you if that is the metes and bounds description that you made up yourself?

A. Yes.

Q. And that is based on the survey as shown in Plaintiffs' Exhibit "G"? A. Yes.

Mr. Johnson: We would like to offer this, if the Court please.

(Testimony of Lee Linck.)

The Court: Is that description the same as you have set forth in Paragraph III of your Amended Complaint?

Mr. Johnson: Yes, your Honor.

The Court: And that is admitted, isn't it?

Mr. Johnson: I believe it is. No; no, not Paragraph III, Paragraph I of the Amended Complaint is, your Honor. Paragraph III was the description based on the location notice of the Defendants.

Mr. Taylor: If the Court please, I want to object to the admission of this Identification in evidence due to the fact [66] that it is—the description there does not conform with the official map that has been introduced in evidence. The official map shows Lot 6, Block 4 to be only 72 feet wide and that shows 308 feet.

Mr. Johnson: It is still the same metes and bounds description in this survey which has already been admitted, your Honor.

The Court: Well, that is just simply a description, a summary of what the map shows.

Mr. Johnson: That is correct.

Mr. Taylor: It reads in there that the description of Lot 6, Block 4, your Honor.

Mr. Johnson: Well, that is what the plat shows, and that is what our contention is, it is simply to assist the Court in determining the metes and bounds description.

The Court: Well, I will sustain the objection.

(Testimony of Lee Linck.)

It is just repetitious of the Pleading, anyway. That is all for Mr. Linck, is it?

Mr. Johnson: Yes, that is all.

The Court: Do you have anything further?

Mr. Taylor: No.

(Whereupon, Mr. Lee S. Linck was excused as a witness and left the witness stand.)

Mr. Johnson: I believe now, your Honor, Mr. Nordale was on the stand for cross-examination. I should like to ask [67] one or two questions in further direct, if I may?

The Court: Yes. Just take the stand.

A. H. NORDALE

having previously been duly sworn as a witness on his own behalf, resumed the stand for further Direct Examination.

Direct Examination (Continued)

By Mr. Johnson:

Q. Mr. Nordale, you are the same A. H. Nordale who testified in this case this morning?

A. I am.

Q. And you were previously sworn. Over the period of years that you have been familiar with this property that is in question in this case, do you know of any refuse or material that was dumped on the property north of the building that

(Testimony of A. H. Nordale.)

is now occupied by the Economy Store, and known as the Nordale Hotel, or Nordale Building?

A. No.

Q. Do you know of any refuse that was ever dumped on the property north of the original meander line of the Chena Slough?

The Court: What are you speaking of?

Mr. Johnson: Original meander line.

The Court: You are speaking of "slough."

Mr. Johnson: I don't know why I am so used to calling it a "slough." I mean the Chena River.

Q. Do you know of any refuse or anything that was dumped in the vicinity of the saw mill at the time the saw mill was there, or afterwards?

A. No, I don't.

Q. This change that has been taking place over the period of years in the channel of the Chena River, has that been a gradual and imperceptible change?

A. It has.

Q. And it changed slightly from year to year, is that correct?

A. That is true.

Q. But you couldn't stand down on the bank and actually watch it move away, the change would be over a—noticeable over a period of time from time to time, is that correct?

A. You would see some increase in the alluvial deposit; in stages of low water you might be able to discern there had been an increase during a normal stage or high stage.

Q. After a flood, in other words?

(Testimony of A. H. Nordale.)

A. After a flood, no. I speak of in cases of extreme low water, the bank, as the years went on, you could see the bank changing and coming up out of the water. It was a very gradual process.

Q. And could you see a corresponding decrease on the opposite side of the river?

A. I could.

Mr. Johnson: You may cross-examine. [69]

Cross-Examination

By Mr. Taylor:

Q. Mr. Nordale, how old were you when you came to Fairbanks?

A. I was a little over ten years.

Q. And how old were you when your father acquired the property which was the subject matter of this action?

A. Twenty-one—I was 27 years of age.

Q. Oh, you were 27. When you was a boy did you go down and play around the saw mill there?

A. We lived directly across the street from the saw mill when we first came to Fairbanks.

Q. And how far towards the river was Lacey Street built? A. Was it filled?

Q. Yes, Lacey Street. How far was it built?

A. Well, I imagine it was built to the point we refer to as the original meander line. To the cut bank. It was built to the cut bank.

Q. And do you remember a small stream that used to run into the Chena River at the foot of Lacey Street?

(Testimony of A. H. Nordale.)

A. There was a slough along the south edge of what is now the playground and there was also an old slough down First Street in front of the saw mill. There was quite a depression in front of the saw mill.

Q. And the surface water through those sloughs would flow into this, what you called an eddy, awhile ago? [70]

A. That I can't swear to. I wouldn't know.

Q. Now, you described this body of water that was at the foot of the incline up which they drew the logs as an eddy?

A. That is true.

Q. Wouldn't that be better described as a little bite in the river? There was a point of land and back of that there was a little bite came in so there was still water?

A. There was an actual back current in there. Floating matter would swing in there. In the fall of the year, in later years I even fished in this eddy. The eddy extended down to that bank north of Lot 4 and upstream.

Q. Well, now, take from the—extend your east line of the lot on down the river, wasn't there a point come down, then the river kind of curved in back of that point a little bit, made some open slack water near there in which they used to have their boats and bobs in there?

A. There was open slack water in there in which the city moored its pile driver and so forth, that I recall.

(Testimony of A. H. Nordale.)

Q. What did the saw mill do with its sawdust, Hjalmar?

A. I can't answer that directly, because I wasn't familiar with the operation.

Q. Or the slabs, either? Did you ever see what they did with the slabs? A. No.

Q. Now, you say that the action of the Chena River has imperceptibly, [71] over a period of years, built that ground back of your building, up to the point that it is now, is that right?

A. That is true.

Q. And how far—how deep do you—would you believe that this alluvial deposits have built up, Mr. Nordale?

A. Well, I fell in off a pile driver once, and I went in over my head in it, but I don't know how far down it went, but that is right at that point.

Q. The water would be six feet deep there, wouldn't it? A. It probably would be.

Q. And then these accretions, as you call it, or this deposit of alluvial matter, has built that up to the surface of the water and up above the surface to the point it is now? A. That is true.

Q. And then this land that is in question, that extends from the meander line up the back of your building, how much higher is that now than the normal level of the Chena Slough—the Chena River?

A. Oh, probably four feet. Four feet, probably.

Q. Then your alluvial deposits, then, in that par-

(Testimony of A. H. Nordale.)

ticular eddy or bite, would total some ten feet then, or better? The river has deposited matter to the extent of ten feet, building that lot up?

A. When you speak—may I go back? When you speak of the present level of the river, the present level of the river [72] is much lower than it was prior to the construction of the dyke, Mr. Taylor, and the flow of Tanana water into this stream, so I don't know what, in the terms of the flow, the deposit would have amounted to.

Q. Now, you state that possibly twice a year there has been a flood which has deposited alluvial matter in that bite, which has built this lot up, is that right?

A. Well, for a long time that—that—that deposit was growing under a normal level of water and I said a couple of times, it may have been once a year, sometimes three times a year, or more, that the water reached higher than normal stage, but it depended entirely on rains and breakups, and so forth.

Q. Well, now, after that little bite had got filled up there until you could see the deposit, would you state then after one of these freshets, or one of these floods, how much would be added to the alluvial deposit that was in that depression there that was formerly this bite in the river?

A. I wouldn't know, Mr. Taylor. It really, from time to time it wasn't perceptible. You could see, in the course of the years you could see it

(Testimony of A. H. Nordale.)

growing in height, but at no time could I ever have seen a deposit I could have measured. I wouldn't know what the depth would be.

Q. You were here in '48?

A. All of '48, sir. [73]

Q. And you were here during the big flood of last year? A. Yes, that was '48.

Q. That was exceptionally high water, was it not?

A. Yes, that was. We have had that same thing several times, but it is an exceptional condition.

Q. Did you, by chance, happen to go down and look at this lot of yours and the land back of it, which is in question in this court, to see how much of an alluvial deposit was made during this flood of last year?

A. I know that there was some deposit. I didn't attempt to measure it, but I know there was some deposit of soil on the ground.

Q. Now, you also testified as to in 1945 that you had had some brush cut off of the land back of Lot 6 of Block 4? A. That is true.

Q. And willow brush was it?

A. Willows, poplars, probably cottonwood, seed that had drifted down the river, drifted into the area.

Q. And they were growing on that lot, though, were they not? A. They were.

Q. And isn't there at the present time some brush growing on there?

(Testimony of A. H. Nordale.)

A. I imagine there will be some small growth. I haven't examined it, Mr. Taylor, but I imagine there is some small growth. [74]

Q. How big was the larger trees? You say there was trees out off the back end of the lot?

A. Well, at least 12 or 14 feet high; probably higher.

Q. And at one time was there some cottonwoods growing directly back of your building on Lot 4 of—or Lot 6 of Block 4?

A. That is probably what I have reference to.

Q. Some cottonwoods about six inches in diameter?

A. I question—no; no, I don't believe there was any that large.

Q. And do you recall, during the times that you used to be down there, of a drain coming down there from the Fairbanks Laundry? And emptying in there near this bite?

A. The Fairbanks Laundry had a pipe in there in which it was drawing water from the river, and there was a First Avenue Street drain that went through Lot 6 on the easterly boundary and trickled down through this ground, and I believe that the Lacey Street storm drain cut in in one corner.

Q. Well, isn't it a fact that the Lacey Street storm drain went right down Lacey Street at the right of your lot and to the right of the land that is in dispute here?

A. Went down to the right of it?

(Testimony of A. H. Nordale.)

Q. Yes. A. Down on the eastern side?

Q. At the left side of the street, but on the right of the [75] property line?

A. Well, that would be on the east side of the property line, just abounding the property line on the east side.

Q. Yes, just on the east side of the line of the property?

A. I believe there was. There were several drains in there, numerous drains all through there.

Q. Isn't there a drain there now, Mr. Nordale?

A. There is a drain in there, yes, that the city has been maintaining.

Q. Now, you state that the river had moved westerly. Did you ever go to the other bank of the river and see how far it had moved, northerly, I meant to say? You state that the river moved north?

A. Yes, I have, on several occasions.

Q. And how far did the bank, the northerly bank of the stream move in a northerly direction?

A. Well, I couldn't gage that in round figures. I would say probably 30 or 40 feet. I had an occasion to be over there in '46 with Colonel Huett, of the Engineers. We were studying bank revetment at the time, and we figured at that time, it was roughly 40 or 50 feet, the cut in there. It was cutting at that time.

Q. Did you ever stake out the land back of your Lot 6, Block 4? A. No, we never did. [76]

(Testimony of A. H. Nordale.)

Q. Did you ever file any location notice?

A. Well, we figured we had a location on it because the building—the Vachon property extended beyond the line when we purchased it.

Q. But Vachon only deeded to you this Lot 6 of Block 4, did he not?

A. According to his description he deeded us land beyond the original meander line. To the Chena River.

Q. But that exhibit, though, says what is known as Lot 6 of Block 4?

A. It was still known by that description, that is true.

Q. Of the Fairbanks—that is Lot 6 of Block 4 of the Fairbanks Townsite, is that right?

A. That is true.

Q. And you never did file any location notice, then, on that property?

A. No, sir.

Q. Or did you ever make any application to the United States for title to it?

A. No, sir.

Q. Now, can you look back and remember about when that brush started to grow on the north part of that land?

A. Yes. Probably about the time we acquired the land, or a little before that. The brush had already started to grow in there by the time we acquired the land. There was [77] a small growth in there, and during the '20's it grew very rapidly.

Q. Now, after that, did any of these floods cover this brush, this small brush with mud?

(Testimony of A. H. Nordale.)

A. Yes, there was flood water around the bases of the brush; yes. I have seen the brush in flood water.

Q. Now, also, you stated that the Fairbanks Laundry had a pipe line for syphoning water out of the river. When you first noticed that, how far from the back end of the building did that pipe extend to pick up water?

A. Well, Mr. Taylor, I suppose the first time I saw it, it was only a very short distance. It may not have been over ten feet or so beyond the building. Ten or fifteen feet. They were taking it out of the eddy, and they extended it, extended it on several occasions.

Q. Was there lumbering operations going on there at the time they had that? A. No.

Q. That pipe in there? A. No.

Q. Was that after the saw mill ceased work?

A. After the Vachon and Sterling building was constructed.

Q. Now, this morning, Mr. Johnson asked you some questions as to the relative height above the river of different parts of this land. Would you state how much higher Lacey Street [78] is than the land which is in controversy here, the land near Birklid and Waxberg's shop?

A. I think Lacey Street extends right down to their level, or below it.

Q. Pardon me, I made a mistake. I meant First Avenue, the intersection there?

(Testimony of A. H. Nordale.)

A. How far it is above their building?

Q. Yes, which is higher, whether Lacey at First, the intersection—how much higher than the lot where Waxberg and Birklid have their building?

A. Well, I made a rough estimate this morning of approximately ten feet. I haven't measured it. I haven't paid any strict attention to that matter of elevation.

Q. You were down there this morning?

A. No.

Q. What? A. No.

Q. Did I understand you?

A. I gave that testimony this morning.

Q. That was a rough estimate from memory?

A. That is right. I don't recall having seen their building since last year.

Q. Now, isn't it a fact that under the back end of your building there is a considerable part of that lot which is lower than the part that Birklid and Waxberg have their building [79] on?

A. There is a small depression in there, just about at the edge of the building. From what I could observe in past years, as this silted in, the river created somewhat of a breakwater. The silt built up; at certain stages of the water the silt would be deposited and it grew and grew more along the outer edge than it did right at the building, where the fewer high stages of water occurred.

Q. But the water would get in there, would it not?

(Testimony of A. H. Nordale.)

A. Oh, yes, in those high stages it came in, yes, but when the accretion reached about the general level of the river, this embankment began to build along the outside and it grew a little faster. The alluvial deposit was a little faster to the north than it was in back. It formed a protection there.

Q. Well, isn't it a fact, Mr. Nordale, that for many years those little gullies that you testified came into the right of Lacey Street and the little depression that came into Lacey Street, wasn't that used to dump all debris, boxes and ordinary refuse that you would have around the stores, things?

A. Never to my knowledge. The Ordinances of the Town of Fairbanks, during those years, were pretty strictly observed so far as refuse was concerned. It was against municipal law to dump in that area.

Q. Now, Mr. Nordale, you testified as to the reasonable rental [80] of the ground where Birklid and Waxberg have their building, I think you testified that you were getting \$185.00 a month for two buildings?

A. Well, it is one building, split in two sections. That price covers the rental of 1, 2, 3, 4 tenants.

Q. And the one of those buildings is about 125 feet long, is it not? A. No.

Q. Very close to it?

A. I don't recall the exact length of that building. I wouldn't know, Mr. Taylor, what the length of that building is.

(Testimony of A. H. Nordale.)

Q. The total rental from the four tenants, then, is \$185.00?

A. That is correct. I have been trying to discourage rent of it so that it can be demolished.

Q. Now, calling your attention to your testimony this morning, you said \$150.00 would be a fair rental for it, just the ground that Mr. Birkliid and Waxberg was renting. Was that for a month or a year?

A. That would be for a month, Mr. Taylor.

Q. You have four tenants up above that have buildings, would be \$185.00 a month, and then you have a piece of bare ground down below that you would charge \$150.00 for?

A. That is true.

Q. If you set the standard of rental of \$185.00 for four buildings, [81] wouldn't that be high according to your own standards?

A. Well, when I arrived at that figure here, I felt there was considerable area involved there, and the fact that Waxberg and Birkliid are on that ground and no portion of it is rentable. There could be several buildings on the ground.

Q. That ground has been there for something like 40 years without anybody building there before?

A. We had hopes of building over the whole area, taking in the whole of Lot 6, and we did not want to divide it up or lease it.

Q. Well, you wouldn't base your rental upon hopes, would you, Mr. Nordale?

(Testimony of A. H. Nordale.)

A. Well, the fact that this ground has been occupied might have some bearing on our plans, too.

Q. But to utilize that as you planned, you would necessarily have to tear down the buildings on Lot 6 or Block 4, would you not?

A. We intended to do that years ago. The only reason those buildings stand was the reason Captain Lathrop wanted them when he was building the theater and apartments. Then, when the war came on, the U. S. Engineers and others required locations and talked us out of destroying them.

Q. Now, do you know where the city boundary line is, where it crosses Lot 6 of Block 4?

A. City boundary line? [82]

Q. Yes, the City boundary, city limits?

A. The city limits would include the accreted area and would be the river bank, so far as I know.

Q. I call your attention to Plaintiffs' Exhibit "F". Now, this plat of 1909, you heard Mr. Linck testify that the dotted line is the city limits?

Mr. Johnson: If the Court please, I don't think that is quite an accurate statement of the testimony, because Mr. Linck merely gave his opinion. He said the symbols indicated that. He didn't say, positively. He wasn't asked positively.

The Court: Objection overruled.

Q. You may answer it.

A. This line (indicating)?

Q. Yes, the dotted line?

A. Well, that is beyond my knowledge. I can't

(Testimony of A. H. Nordale.)

swear to that. That dotted line doesn't mean anything to me, so far as symbols is concerned.

Q. Well, if the plat that has been introduced in evidence here shows that Lot 6 of Block 4 to be 72.83 feet in depth, now that would take the lot down to there (indicating). That is the mark and also, as Mr. Linck testified, that is the city limits. That line. What would be the black line? Would that not be the bank line of the river at that time?

A. I wouldn't know, Mr. Taylor.

Mr. Taylor: May I have just a moment?

(Paused). [83]

Q. Mr. Nordale, what lot was the saw mill located on when Parker and Vachon had it?

A. Parker and Carroll?

Q. Yes, Parker and Carroll?

A. Lot 6 of Block 4.

Q. And how far from Lacey Street was it?

A. I can't tell you. I imagine that Lacey Street ran just about where it does now, and they were up to it, probably up to what would be the sidewalk line now.

Q. That is the First Avenue sidewalk?

A. And Lacey. Lacey. They built Lacey to the edge of the bank there, and I imagine there were a few feet of Lacey extending from the intersection of First North to the meander line and they probably were up to the sidewalk line there.

Q. Do you know whether that mill was located at right angles to the First Avenue line, or was it kind of set on the lot in an angling direction?

(Testimony of A. H. Nordale.)

A. I can't remember, Mr. Taylor, exactly how that was.

Q. Now, calling your attention to that little bite that was in there, do you remember a little bridge across there, with a kind of a hand railing on each side?

A. No.

Mr. Taylor: I believe that is all, Mr. Nordale.

Redirect Examination

By Mr. Johnson: [84]

Q. Mr. Nordale, during the time you had this property, and after you acquired it, and when you said it began to grow up with brush, that was back about the time your father first acquired it, is that correct?

A. That is true.

Q. And all of that time you kept that portion of the property clean and free from refuse and rubbish, did you not?

A. So far as we could; yes.

Q. Now, this bridge Mr. Taylor has just asked you about, isn't it a fact that bridge he is talking about is farther up-stream?

A. I believe so, Mr. Johnson. I believe that probably was the bridge that crossed the little slough that was upstream between the Parker and Carroll mill, and the mill—there was a saw mill due East of the Parker-Carroll mill.

Q. How far upstream was that other saw mill?

A. Well, it probably would have been on what is now the playground.

Q. And there was a little foot bridge?

(Testimony of A. H. Nordale.)

A. There was a little slough up there with a foot bridge that went across it.

Q. But there was no foot bridge on your property?

A. I can't recall where it went across to. I can't recall anything like that.

Mr. Johnson: That is all. [85]

Mr. Taylor: That is all.

(Whereupon, Mr. A. H. Nordale was excused as a witness and left the witness stand.)

Mr. Johnson: May we have a short recess, your Honor?

The Court: Recess until a quarter past.

(Whereupon, Court was recessed for ten minutes.)

The Court: Counsel ready to proceed?

Mr. Johnson: We are ready.

Mr. Taylor: Defendant is ready.

The Court: Very well.

Mr. Johnson: If the Court please, at this time I should like to introduce the deposition of Fred Parker, Sr., which was taken under stipulation some time ago. I believe the original deposition is in the file, or I could read from a copy. Which would you prefer?

The Court: You might as well take the original.

Mr. Johnson: Mr. Taylor, would you waive reading of the commission to take the deposition, and the stipulation?

Mr. Taylor: We will waive, your Honor.

The Court: Very well.

(Whereupon, the deposition of Fred Parker, Sr., was read as follows:)

“Fred Parker, Sr., being first duly sworn on oath testified as follows:”

DEPOSITION OF FRED PARKER, SR.

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. F. B. Parker.

Q. Are you Fred B. Parker, Sr.? A. Yes.

Q. Do you reside in Fairbanks? A. Yes.

Q. How long have you live in Alaska?

A. Alaska? Since 1897.

Q. How long have you lived in Fairbanks and vicinity? A. Since 1903.

Q. You came to Fairbanks in 1903, is that correct? A. Yes.

Q. Are you familiar with the property known generally as Lot 6 in Block 4 of the Townsite of Fairbanks? A. Yes.

Q. That property is located on the Northwest corner of First Avenue and Lacey Street?

A. Yes.

Q. When did you first become acquainted with that property? A. In May, 1903.

Q. Did you acquire the property at that time?

A. Yes.

(Deposition of Fred Parker, Sr.)

Q. In company with someone else? [87]

A. Yes.

Q. Who was that? A. Charles Carroll.

Q. Did you and Mr. Carroll purchase that property at that time? A. We did.

Q. What, if anything, did you do with the property after you purchased it?

A. We erected a sawmill on it.

Q. Was that sawmill erected on the whole lot? Did it occupy one whole piece of property, or do you remember?

A. We occupied the east side of the lot.

Q. Right up to the line along Lacey Street?

A. Yes.

Q. Do you remember how deep the lot was at that time—that is from First Avenue to the river, approximately? Do you have any idea?

A. Around 70 feet. About 70 feet.

Q. Did the lot run all the way to the river?

A. To the meander line of the river.

Q. Did it when you purchased it? A. Yes.

Q. How long after you purchased this lot did you continue to occupy it with your sawmill?

A. To the best of my recollection it was 1906.

Q. From 1903 until 1906 you operated this sawmill on that lot, [88] is that right? A. Yes.

Q. What, if anything, did you do with that lot after 1906, or during 1906?

A. We rented it to Vachon and Sterling.

Q. Did you discontinue operating the sawmill?

(Deposition of Fred Parker, Sr.)

A. Yes.

Q. Did you remove the sawmill from that lot before you rented it?

A. No, the Tanana Lumber Company did.

Q. I see. The sawmill was subsequently sold to the Tanana Lumber Company?

A. The three mills amalgamated and formed the Tanana Lumber Company.

Q. After the three sawmills were joined together, or amalgamated, you say that the one you operated on Lot 6 was removed from Lot 6?

A. Yes.

Q. After the sawmill was removed during the year 1906, I think you said, then you leased this lot to Vachon and Sterling? A. Yes.

Q. Is that correct? A. Yes.

Q. Carroll and Parker—you and your partner, Mr. Carroll? A. Yes. [89]

Q. Now, after you leased this lot to Vachon and Sterling, did they take possession of the lot?

A. Yes.

Q. And what, if anything, did they do with reference to building on it that you know of?

A. They erected a building.

Q. What type of building was it, do you remember?

A. Well, it was kind of a rough building, corrugated iron, two by four frame. I believe they had it insulated because they stayed in it in the winter. I didn't pay much attention.

(Deposition of Fred Parker, Sr.)

Q. Do you know whether or not that building which they erected is still on the premises?

A. I think part of it is. The front part of the building is the building which they originally erected; in fact, they might have built all of it.

Q. Now, Mr. Parker, I want you to look at a photograph which we will mark Plaintiffs' Identification 1, which presumably was taken in 1905, and I will ask you to examine that photograph and if you recognize the subject matter or the picture. Do you recognize that picture? A. Yes, I do.

Q. Can you tell what it purports to represent?

A. Well, it's the waterfront of Fairbanks from the Northern Commercial Company store up to, and beyond the old sawmill. [90]

Q. And what side of the river was it taken from?

A. It was taken from the north side of the river.

Q. Looking south?

A. Looking south. It shows the south side.

Q. Does that picture represent the condition of the water front in the year 1905?

A. Yes, it does.

Q. During that year, were you and Mr. Carroll still operating your sawmill? A. We were.

Q. Was your sawmill located on Lot 6 of Block 4? A. Yes.

Q. Does that picture show your sawmill?

A. It does.

(Deposition of Fred Parker, Sr.)

Q. Can you indicate with a pencil where it is, by placing a mark on it?

A. By placing a mark on it?

Q. Yes, just place a mark underneath where it is.

A. There's the sawmill right there (indicating). Doesn't give much of a mark.

Mr. Taylor: Let me see. Maybe we don't have to have much of a mark on it. (Mr. Parker indicated mill to Mr. Taylor and Mr. Taylor gave him a pen with which to place the mark indicating the location of the mill.) [91]

Q. The sawmill appears in that picture to be near the left-hand border of the picture; is that correct? A. Yes.

Q. The "X" which you have marked on this photograph shows the sawmill?

A. It shows the roof of the mill, yes.

Q. What is the tall object in the front?

A. That is the smokestack.

Q. The smokestack belonged to your sawmill?

A. Yes.

Q. Back of the mill, as indicated, is a structure which seems to—or extends down the bank into the water. Can you tell what that is?

A. That is the sawmill slip where we pulled logs up.

Q. In back, or at the—along the river bank below the sawmill slip, can you tell what that consisted of, as far as the river is concerned?

A. I don't just catch your question now.

(Deposition of Fred Parker, Sr.)

Q. Did you have a millpond back of the mill?

A. Right at the foot of the mill slip was the millpond. There was a big eddy.

Q. And at that time, by reason of that eddy, you were able to use that portion of the river for your millpond?

A. That's what caused us to build there—that ideal eddy.

Q. Did you observe any action of the river on this millpond [92] during time that you operated your sawmill there? A. We did.

Q. Will you explain what this was?

A. Well, each year the silt kept coming in there and we couldn't hold as many logs as we could the first year.

Q. That silt came in and was deposited by the natural action of the river? A. Yes sir.

Q. Did you or Mr. Carroll, or anyone else, for that matter, ever dump any dirt or refuse in that millpond? A. No, sir.

Q. Was there a slough in front of the mill on First Avenue that you filled in? A. Yes.

Q. That was filled in while you had your sawmill there, was it? A. Yes.

Q. Was that done for the purpose of building up a road or street? A. Yes.

Q. After 1906, did you continue to live in Fairbanks or did you move out somewhere?

A. We moved out on Fairbanks Creek.

(Deposition of Fred Parker, Sr.)

Q. How long did you live out on Fairbanks Creek?

A. I believe it was three years. Two or three years. [93]

Q. During that time did you have occasion to come into Fairbanks? A. Occasionally.

Q. Did you make any observation of the old mill site or the river during those years?

A. I would just glance at it.

Q. Did you see any change in the meander line or the bank of the river? Did you notice any such change?

A. I noticed it was filling in with silt and the pond was practically gone.

Q. When did you come back to Fairbanks to live, 3 or 4 years was it?

A. Something like that—two or 3 years.

Q. That would be about 1909 or '10?

A. If I remember rightly, I went into the automobile business in 1908.

Q. And at that time you were back in Fairbanks?

A. Yes.

Q. And you continued to live in Fairbanks ever since, most of the time?

A. Well, no. We moved to Ester Creek. I ran a stage line from Ester Creek to the old Tanana Siding. I was there for a year or two.

Q. But that was in Fairbanks vicinity, or in the vicinity of Fairbanks? [94] A. Yes.

Q. Since 1906, down to the present, have you

(Deposition of Fred Parker, Sr.)

observed, from time to time, the action of the river behind this particular piece of property?

A. Well, I didn't observe it much until 1921. I was in town more then and walking around where I could observe.

Q. Where were you employed in 1921?

A. I was in the Marshal's Office.

Q. How long were you in the Marshal's Office?

A. Twelve and a half years.

Q. I'll show you a photograph which we will call Plaintiffs' Identification 2 which was purportedly taken in 1915 and I'll ask you if you recognize the subject matter of that photograph?

A. Yes, I recognize it.

Q. Will you tell what it is?

A. Well, let's see. That's where the sawmill was (indicating.)

Q. Does this whole picture itself represent generally the Town of Fairbanks and the water front along First Avenue? A. Yes.

Q. Can you indicate with a pencil where the old—where your sawmill was formerly located?

A. Do you want me to use the pen again?

Mr. Taylor: I think it would be well to establish [95] when that picture was taken. Do you know when that picture was taken?

A. I don't know. The date here in October. . . .

Q. What date is that?

A. It was October, 1915.

Q. Does that represent the situation as it was

(Deposition of Fred Parker, Sr.)

in 1915? Do you know, is that about the way it looked?

A. Yes, that's about the way it looked.

Q. You were here in 1915? A. Yes.

Q. Can you tell the approximate location of the sawmill?

A. It was right where that building is (indicating).

Q. This "X" marks the approximate location of your sawmill? A. Yes.

Q. Now, the rear end of the building which you have marked with an "X" was—is that considerably further toward the river than where your saw mill was? A. Do you mean to the water's edge?

Q. Yes. A. Yes, it is.

Q. Do you recognize this, what looks like a line, or a pipeline of some sort; do you recognize that?

A. That wasn't there—no, I don't recognize it.

Q. It probably was there when this picture was taken. A. Oh, yes. [96]

Q. You may or may not have seen it?

A. I don't recollect.

Q. The waterline as shown in this picture is considerably below where it was at the time you had your sawmill there? A. Yes, it is.

Q. And this picture indicates a beach, or bank, along the river which wasn't there when you had your sawmill, is that correct?

A. That's right.

(Deposition of Fred Parker, Sr.)

Q. Do you know how that beach, or bank, came to be there?

A. Well, it's silt constantly coming down the river and building it up.

Q. Was any of that bank built up by artificial means? A. Not that I know of.

Q. I will show you a document which we will identify as Plaintiffs' Identification 3. I will ask you if you have had occasion to look at it before?

A. I saw it today for the first time.

Q. Can you tell briefly what it is, or what it purports to be?

A. Well, it shows First Avenue and Lacey Street and Block 6 where the sawmill originally was.

Q. Lot 6? A. Yes.

Q. In other words, it is a plat of the original Lot 6 of Block 4; is that right? [97]

A. Yes, that's right.

Q. And the heavy line marked "A" and "B" on that plat—does that indicate the original meander line of the Chena River at the time you had your mill there, or do you know?

A. Well, I know that the lot where the sawmill was was about some 70-odd feet deep, and, of course, I don't know anything about the survey.

Q. And at that time it ran right down to the river? A. Yes.

Mr. Johnson: You may cross-examine."

(Whereupon, Mr. Taylor read the Cross-Examination of Mr. Parker, as follows:)

(Deposition of Fred Parker, Sr.)

Cross-Examination

By Mr. Taylor:

“Q. Who did you acquire Lot 6 of Block 4 from, Mr. Parker?

A. From Steel, Smith and Stewart.

Q. And had the Townsite been surveyed at that time, Mr. Parker?

A. Well, sir, I couldn't tell you.

Q. Do you know whether the Townsite Trustee had, by that time, issued deeds to the claimants of lots in Fairbanks?

A. No, I don't. All I know is that they showed us where the corners were.

Q. Did you acquire any other property in the immediate vicinity of the lot in question?

A. Now, we had a lumber yard on the other side where Wells [98] Alaska Motors is. We didn't buy it; we might have leased it. We used it as a lumber yard.

Q. Was there a street between the lumber yard—a roadway? A. Yes.

Q. Isn't it a fact, Mr. Parker, that there was a small stream running down past the mill and into the Chena Slough?

A. Not that I remember.

Q. A little gully alongside your lot?

A. There was a blind slough. Evidently the river had been in that far, but it was choked up above, and that caused a blind slough. But it was dry—

(Deposition of Fred Parker, Sr.)

perfectly dry. There was no water in it that I recollect. That was First Avenue.

Q. How wide was the lot, Mr. Parker, do you remember?

A. I don't just recollect, now, but we had an office at one side of it. I imagine seventy, eighty—maybe a hundred feet; I don't remember.

Q. It was considerably wider then than this plat which was exhibited to you as Plaintiffs' Identification 3? A. It was considerably wider.

Q. Did you ever acquire a Townsite's Trustee Deed to that lot? A. I don't remember.

Q. Now, you operated the sawmill there for approximately three years, is that right?

A. Yes.

Q. What did you do with your slabs and sawdust? [99]

A. Well, they would take the slabs away as fast as we could make them. The sawdust—we put a lot in the streets. They were after sawdust for banking houses and filling walls. There was a demand for both sawdust and slabs.

Q. Now, you say, Mr. Parker, that your lot ran from First Avenue back to the river—to the river bank? A. To the river bank? Yes.

Q. Now calling your attention to Plaintiffs' Identification 1, you noted that this picture was taken on June 15, 1905. Do you think that that would be the approximate date that was taken?

A. Yes. I think that would be right.

(Deposition of Fred Parker, Sr.)

Q. Also, I call your attention to Plaintiffs' Identification 2; you say that date on there is October, 1915. Now, Mr. Parker, did you notice the condition of the river during the several years that you were there running the sawmill?

A. Yes, I noticed it the three years that we were there.

Q. And you would notice the rise and fall of the river according to the seasons? A. Yes.

Q. Isn't it a fact, Mr. Parker, that this picture taken in June, 1905, would naturally show the river much higher than one taken in October?

A. Yes.

Q. There would be a great difference in the height of the [100] water, would there not?

A. I am looking here at the water level. That bank was right straight down from where the mill slip was. We had to put in pilings at the end of the mill slip. You can see where the dead water—you can see the line of the dead water. It was deep just at the bank. We had to put in pilings. The end of the slip was way down below the low water mark so that we could get logs up to the mill at all seasons.

Q. I call your attention to the Exhibit 1—isn't this sawdust in here, (indicating) Mr. Parker?

A. I don't think it is. We were warned not to put sawdust in the river. We were warned not to put sawdust in the river on account of the fish. We knew better than to do that anyway.

Q. What would that indicate, Mr. Parker?

(Deposition of Fred Parker, Sr.)

A. I would have to have a magnifying glass to do that. I couldn't tell you. It looks like the end of Lacey Street. It's light color.

Q. It is light color or something, isn't it?

A. Yes, sir.

Q. Now, isn't it a fact, Mr. Parker, that in June this river would be much higher than it is in—just before freeze-up, October 15th—that in June this river would be way up here (indicating)? [101]

A. Of course, the water rising and lowering makes a big difference. When this first picture was taken, that is Exhibit 1, that was a cut bank here and since then that cut bank has filled in.

Q. Isn't it a fact that a lot of that fill has been made by dumping debris—old stoves, beds and things like that—in it?

A. Not to my knowledge. It's against the law to do that.

Q. Did you mark the mill on this particular exhibit? The mill would come out to Lacey Street?

A. I know it was right in there, east of the mark where the slip was.

Q. Do you know what that building was, Mr. Parker?

A. Well, I think that's the Vachon Building.

Q. Vachon and Sterling put a building on that property?

A. Yes.

Q. Did you ever know of any large fires occurring later in this particular part of town?

A. Yes, three or four large fires.

(Deposition of Fred Parker, Sr.)

Q. And you remember the debris of one large fire in this area here that was dumped in that little slough, or eddy, where you used to keep your logs?

A. No, I don't remember. It was our log pond.

Q. It ceased to be a log pond then. A number of years after that, it could have been done and you not know about it? [102]

A. Yes, it could have.

Q. When did you sell that lot, Mr. Parker?

A. Well, I don't remember. We rented it first, and I think the records would be the best evidence of when we sold it.

Q. Did you sell it to Vachon and Sterling?

A. Yes.

Q. And you don't remember, at that time, whether you had received a Trustee's deed or not?

A. I don't remember a thing about the deeds.

Q. Do you know when the Nordale Estate acquired title to that property? A. No, I don't.

Q. Calling your attention to Plaintiffs' Identification 3, does that plat indicate the city boundary—the boundary of the City of Fairbanks?

A. Well, I'd say that this part did (indicating heavy line marked "A" and "B"). From the position of First Avenue, I'd say that from "A" to where the sawmill is—was, and possibly up to here, up to the next angle.

Q. Now, other than that, everything below that line would be in the city limits, and everything above it would be outside the city limits?

(Deposition of Fred Parker, Sr.)

A. At that time, yes.

Q. Let's see what date this is—April 29, 1948. At the time when you had the lot, this (indicating heavy line marked [103] "A" and "B") was the city limits?

A. Yes. The north boundary was the bank of the river.

Mr. Taylor: That's all."

(Whereupon, Mr. Johnson read the Redirect Examination as follows:)

Redirect Examination

By Mr. Johnson:

"Q. Mr. Taylor indicated line "A" and "B"—you indicated line "A" and "B" as being the old boundary line? A. Yes.

Q. Mr. Parker, with reference to Identification 1—Mr. Taylor asked you what this light colored area was, next to the sawmill slip and he asked you if that were sawdust. I believe that you said you didn't think so? A. Yes.

Q. That light colored area could be sand or silt, could it not? A. It could be, yes.

Q. In other words, the type of soil in Fairbanks, and particularly along the river is a light colored, sandy loam, isn't it?

A. Well, I see light color down here, underneath the Senate Saloon.

Q. I mean the color of the streets around Fairbanks, right now, is very light in color, when it's dry.

A. Yes, that's true. Mr. Taylor called my at-

(Deposition of Fred Parker, Sr.)

tention to [104] this light spot—this might be grass; if you had a magnifying glass. . . .

Q. But you do not believe that it was sawdust?

A. It does appear to look as if something had been dumped in there; I don't know. It might be. At the same time, we didn't allow anything to go into that eddy; that is what we put the sawmill there for, that millpond.

Mr. Taylor: If that was grass, in June it wouldn't be that color, would it?

A. I don't know. It would be more likely to be green and wouldn't show up in the film.

Q. During this period when you operated the sawmill, did the Chena River rise and fall more than once during the year? A. Yes, it did.

Q. Did you have high water in the spring?

A. Generally when the ice went out, it would raise up, bank full.

Q. And then did the river rise again later?

A. As a rule, that temporary bridge we generally had to put in twice a year.

Q. When did that happen?

A. When the ice went down, and receded we put up the first bridge; and in July, when the rains came, we generally lost the bridge the second time.

Q. Then you had a high water period in May, perhaps, or sometime [105] along there?

A. After the ice went out, yes.

Q. And then again, later in the summer?

(Deposition of Fred Parker, Sr.)

A. Yes. I know, because we had to furnish the lumber for that bridge.”

(Whereupon, the Recross Examination was read by Mr. Taylor, as follows:)

Recross Examination

By Mr. Taylor:

“Q. Did you ever have high water as late as October, do you recall?

A. Yes, in October. Sometimes we have had high water in September.

Q. Plaintiffs’ Identification 2 shows real low water in October, doesn’t it?

A. The water is generally low in September, October.

Mr. Taylor: That’s all.”

Mr. Johnson: Will you waive the reading of the certificate?

Mr. Taylor: Yes, we will so waive.

Mr. Johnson: I would like to have this introduced in evidence.

The Court: It is not introduceable.

Mr. Johnson: Very well. I would like, now, to offer Plaintiffs’ Identifications “1” and “2”, which have been referred [106] to in the deposition.

Mr. Taylor: If the Court please, I can see no reason why they are introducing these. Object upon the ground they are indistinct and I don’t believe it would add anything to the case. I am not particularly—they might be more misleading than the actual verbal testimony.

(Deposition of Fred Parker, Sr.)

Mr. Johnson: Well, if the Court please, counsel identified both the exhibits in his cross-examination of the witness, Fred Parker, Sr. There are marks, indicating the location of the property and the mill, which were placed on the Identifications at the time the deposition was taken, your Honor, placed on there by Mr. Parker, with Mr. Taylor's pen, I might add.

The Court: Well, I will admit Identification Number "1". I think the other is too vague and indistinct.

Clerk of Court: Identification "1" is Plaintiffs' Exhibit "H".

(Plaintiffs' Identification "1" admitted in evidence as Plaintiffs' Exhibit "H".)

Mr. Johnson: Mr. Adolph Wehner.

ADOLPH WEHNER

(Adolph Wehner, called as a witness on behalf of the Plaintiffs, was duly sworn and testified as follows:)

Direct Examination

By Mr. Johnson:

Q. What is your name, please?

A. Adolph Wehner.

Q. Can you hear me all right, Mr. Wehner?

A. Well, I am bad on hearing. I can't hear very good unless it is very loud and slow.

Q. Well, perhaps I can stand over here a little closer. Where do you live, Mr. Wehner?

(Testimony of Adolph Wehner.)

A. I live on Third Avenue.

Q. In Fairbanks? A. Yes sir.

Q. How long have you lived in Alaska?

A. Oh, I lived in Alaska since 1905. I came to Dawson in '87.

Q. Well, you have lived in Alaska since 1905, you say? A. Yes.

Q. And how long have you lived in Fairbanks?

A. Ever since.

Q. You have lived here all of the time, is that right? A. Yes.

Q. When you first came to Fairbanks do you remember a sawmill down on the corner of First Avenue and Lacey Street, that was operated by Carroll and Parker? A. I know it very well.

Q. Have you seen it a number of times? [108]

A. Oh, yes, pretty nearly every week.

Q. Are you acquainted with that property?

A. I do.

Q. Can you tell where the sawmill was located, about? Can you describe how it was sitting on that property?

A. The property was located right there on Lacey Street there.

Q. Well, was it near the East side of the lot, right along Lacey Street? A. Yes.

Q. Now, at the time that you first became acquainted with that saw mill, how deep was the lot? I mean, did the saw mill run clear back to the river?

A. Yes. The river at that time had a kind of

(Testimony of Adolph Wehner.)

an "S" shape, came from Garden Island, or Slater-ville, over and turned—it was a right kind of a turn—and turned into that corner lot where Vachan—or where Mr. Nordale was. The skid was going up that way.

Q. Right up out of the water—the skid went right up out of the water? A. Yes.

Q. Now, have you—oh, strike that out. When did they move the saw mill off of that lot, if you remember?

A. Well, it was—I think it was a couple of years later, or a year later, if I recollect, but it was some time later [109] they moved it off, and I noticed that Fred Norris built a saw mill across there on what they called Dead Man's Slough.

Q. They moved this mill over there, is that it?

A. Right.

Q. Now, while Carroll and Parker were operating this saw mill on this lot, did you ever see them dump any sawdust or slabs into the river?

A. That I don't know, exactly, but the sawdust pile is right on the children's playground now. There was a sawdust pile underneath there, and I cleaned the children's playground last year or the year before—I got to clean it every year for the City, and the sawdust is piled there.

Q. Well, that wasn't in the river, though, was it?

A. No, no; that wasn't in the river though. That was back on the far end of the saw mill at that time.

(Testimony of Adolph Wehner.)

Q. And that was out of the river?

A. Oh, yes.

Q. And that was off of this lot? A. Yes.

Q. That the saw mill was on. Now, have you noticed, or have you observed that property from time to time since they moved the saw mill off there?

A. Yes, sir. It will be a year back, the City put in the drain from 11th Avenue down Lacey Street, all the way down, and that was the outlet of it and since that sewer got in, [110] it busted that drain all to pieces, and they have to put the drain in the sewer, but the only drain was left there, and goes in that drain right on the outlet from Second Avenue. You see, that runs on there. Well, last Spring I noticed when I was working there, that they had a fill in that ditch.

Q. Who had filled it in?

A. Well, I don't know. The people what built there.

Q. Waxberg and Birklid, you mean?

A. I don't know who they were, but I told them at the time, "You are going to be in trouble if you blockade this drain here, because that belongs to the City."

Q. Now, the city maintained that drain?

A. Maintained that for years.

Q. Did they have the permission of the Nordale Estate to put the drain in across that line?

Mr. Taylor: Just a moment, I will object to

(Testimony of Adolph Wehner.)

it on the ground no testimony no drain put across the lot. His testimony was a drain across Lacey Street.

Q. Where did that drain go, on Lot 6, of the Nordale property?

A. I don't know exactly where it goes on the property, but pretty close, anyhow, onto the property. I know when we surveyed last Spring, and Mr. Kelsey, the Manager of the City, says "Well, you are going across that property with the ditch." From this side to the hospital. [111]

Q. All right. Now, what I am trying to get at, is, Adolph, after Carroll and Parker removed the saw mill, did that lot start to fill in, or did the river start to move over?

A. Yes, the river changed pretty near altogether, and it put all the silt in there. If I recollect, there is a kind of a high bank on this side.

Q. What do you mean by "this side"?

A. Oh, this side on the property. That all filled in.

Q. Right in back of where the old saw mill used to be, that is what you mean?

A. Yes, on the side of it.

Q. That is right, and that began to fill in, did it?

A. It filled in right along. In fact, several years I had to go take the men and dig out that ditch again. It filled on the lower end with silt, and I had to dig it out and throw it over. Of course, I wasn't particular, if I throwed it on the lot it

(Testimony of Adolph Wehner.)

didn't bother me any, so long as I got it out of the way.

Q. And all of that left bank of the Chena began to fill up and the Chena moved to the North, did it, to the other bank?

A. It cut away on the other side where the hospital is, and it filled up on this side.

Q. That is right, and that has been going on slowly ever since?

A. Ever since I can remember.

Q. Ever since they moved that sawmill? [112]

A. Yes.

Q. And that has been gradually building up, is that right?

A. I will give you an illustration on the lower end of town. On Block 25, that used to be a full block, and now the river got three-quarters of the block now. It has gone away. In fact, the old channel is half-way across the river.

Q. That is just the opposite of what this is?

A. Well, no, the same thing, except cut in on this side and filled in on the other.

Q. Do you know of anybody ever dumping any refuse or anything else back of the Nordale property?

A. Yes, they dumped lots of that, because I was detailed from the City to work and clean that up, and cut all the brush out of there.

Q. Well, now, I mean, this building up that was going on, was that caused by the action of the

(Testimony of Adolph Wehner.)

river, or was it caused by somebody dumping stuff there?

A. Well, the river helped a lot, but they dropped a lot of tin cans and stuff thrown in there, too, and in flood time it was covered over.

Q. That was all cleaned out. You cleaned that out?

A. I cleaned most of that out, you know.

Q. So that the property that is now back of the building—the old Nordale Hotel—has been built up gradually by the action [113] of the river?

A. Yes, sir.

Mr. Johnson: Cross-examine.

Cross-Examination

By Mr. Taylor:

Q. How long have you been with the City, Mr. Wehner?

A. Well, I have been ever since the Town started.

Q. Were you working for them in 1905 and 1906?

A. I have been working with Joe O'Connor, making drains—the first drains of the City's, off the lower end, South of the Nordale.

Q. You know where those drains are located that go by that lot?

A. Yes, sir.

Q. Isn't it a fact they go right down Lacey Street?

A. That drain Gilsher put in, he put that drain

(Testimony of Adolph Wehner.)

from 11th Avenue, a box drain, all the way to—into the drain on Lacey Street.

Q. That drain is abandoned?

A. Oh, no, that drain is not abandoned, and that drains Second Avenue, and it drains some of the others that is connected on it yet. That drain is below the N. C. tunnel. The tunnel—where they put that tunnel they never touched that thing, because that drain is about fifteen or twenty feet deep.

Q. Where does it empty now? [114]

A. It empties near where Nordale's house is going into the river.

Q. It goes on beyond, past the building?

A. It keeps filling in, you know.

Q. When you was cleaning up the streets the other day, didn't you dump some debris down there?

A. I did.

Q. Have you dumped there before?

A. Oh, yes, lots of times.

Q. And isn't it a fact, you say there was a depression in there—kind of a slough—a dry slough—over towards the ball grounds?

A. There was a slough. A small slough, but I noticed that from Wendell Avenue all that water there is now, we cut another ditch there. In front of that Army cabin there.

Q. Prophylactic Station? A. Yes.

Q. Well, now, isn't it a fact that a lot of debris was dumped into that eddy, you might say,

(Testimony of Adolph Wehner.)

or a bite, that went in there by the old slip, after the mill was moved out and a lot of people dumped?

A. Not that I noticed since I was here. It practically started filling in from the high water forming silts and especially I noticed the last couple of years, since the F. E. started on Fifth Street, at the lower end of Fairbanks, [115] there is an awful lot of silts coming down every year. In fact, over at the brewery, you can see the silt since we started the brewery. We filled it inside from the river bank, and that filled in three feet higher.

Q. On that lot?

A. On that lot; yes.

Q. Now, when was the year you cut the trees down? A. Oh, a couple of years ago.

Q. 1945?

A. 1945; '44. I didn't keep track of that. All the brush there.

Q. There was some pretty fair size brush there?

A. No, it was all willows.

Q. No elders?

A. Maybe some cottonwoods.

Q. Cottonwoods?

A. Maybe some cottonwoods?

Q. Isn't there some trees on the river now that is two or three inches through?

A. What is that?

Q. Did you notice recently some trees along the river bank on that property, two or three inches thick? A. No.

(Testimony of Adolph Wehner.)

Q. You didn't see them? You been working there lately?

A. Yes, I have been there quite often. Go there pretty [116] nearly every week for that matter.

Q. You say you went there in 1945 and you cut some brush off the far end of that property we are having a dispute over?

A. I hauled all the brush—I got orders to haul all the brush away into piles, and all the rubbish.

Q. Now, was that old slough in there, or bite, or eddy, whatever you call it—was that all filled in?

A. It was filled in long ago.

Q. And when you went down there at that time, how high was that above the ordinary water level of the river?

A. Well, you see, the play ground——

Q. You don't know? A. No.

Q. How high was that?

A. You go down and look at it and you see the level of that. I tell the Court, that has been filling in ever since 1905—ever since the saw mill was taken away from there and the river took a different channel altogether. In fact, back of the Nordale Hotel you couldn't walk on the beach there years ago. You couldn't walk there. That was all filled in since that. They had pile drove in there in back of the Nordale at that time, just the same as the Fairview Hotel has got now. That has all been filled in.

Q. Now, you say there was a dry slough come

(Testimony of Adolph Wehner.)

over from the play ground. Now, what was that filled in with? [117]

A. The play ground? That wasn't such a slough that I noticed. It was a kind of a ditch, like.

Q. Well, what was it filled up with?

A. Well, the City went to work and filled up and graveled Wendell Avenue every year pretty near.

Q. Now, when you went and cleaned up the lot—the lower end of that property that is in dispute here—you say there was tin cans around there?

A. Sure, there was tin cans and all kinds of rubbish I had to clean up.

Q. What did you do with it, throw it in the river?

A. Put it down on the dump. I hauled it away. That was the orders.

Q. What else was there, besides tin cans?

A. Well, there was toilets, people throwing toilets there. I cleaned that all up. Cleaned the lots clean by orders from the head man.

Q. But when you went down there this lot, where Mr. Waxberg and Birklid's building is now, was that filled up about the same level as it is now?

A. Pretty near.

Q. It is about the same? A. Yes.

Q. And was there grass growing on there, too?

A. Well, hardly. Well, yes, that goose grass looks like [118] Christmas trees. Some of that was there.

Q. And now, how much lower is that land where

(Testimony of Adolph Wehner.)

Mr. Waxberg and Birklið's building is, than the land where the Nordale building is?

A. Well, when Vachan was there, when I notice first, there was a gradual going down to the river. Gradual grade.

Q. Well, I will ask you another question, maybe you can answer this one. How much higher is the First Avenue at the intersection of Lacey Street,—how much higher is it at the intersection of Lacey and First Avenue than the ground down where the Waxberg and Birklið shop is?

A. I couldn't tell you that, but I imagine the low stage of water in the Chena River, and it is (interrupted).

Q. No, you are not getting me. We are not worrying about the water in the river, we are worrying about how much higher First Avenue is than the ground down where Waxberg's shop is?

A. Well, I judge about ten feet.

Q. Ten feet? Then how much higher is the ground at Waxberg's than the ordinary level of the river?

A. Well, the ordinary level of the river? Well, I judge about fifteen feet. Might be less than that. I don't know. I haven't put the instrument on it yet.

Q. That is just an estimate, is it, Mr. Wehner?

A. I haven't measured it yet. [119]

Q. How often do we have these floods, Mr. Wehner?

(Testimony of Adolph Wehner.)

A. I have seen a couple of dozen, and the biggest was in 1905 in the Summer, when it washed out First Avenue.

Q. And could you tell the Court how much each one of these floods would raise that land there back of the Nordale's?

A. That just depends on how high the flood is, and how much silt drifts along. I would say just about six inches every flood.

Q. Did you go down there last Spring, when we had the big flood, and see how much it had filled in?

A. Well, I noticed that was over four inches on the play ground.

Q. You didn't look down on it?

A. I wasn't interested in anybody's property.

Q. And you think, then, that these floods have raised that lot up there by Waxberg and Birklid's about fifteen feet since 1905?

A. I told you there was a gradual slope going down from Front Street. When we put in that ditch, I know we had to go down quite a bit from the outlet. Waxberg's put the dirt in it. We wanted him (interrupted).

Q. He built that drainage ditch on out?

A. I told him to, or otherwise it would block all the water from Second Avenue.

Q. Well, so the ditch is still in use? He didn't block it?

(Testimony of Adolph Wehner.)

A. Well, if he didn't put the drain in, it would have been. [120]

Q. Well, he did put the drain in?

A. I guess so; I don't know.

Q. Do you know what kind of foundation is the back end of the Nordale building? On Lot 6 of Block 4?

A. I don't know. I haven't ever been underneath there. But they had a shack in back of it. I tore that all down. He wanted that all down. He wanted the fence all taken away. Of course, I charged it up to the property. That was the orders from the City.

Q. You charged it to Mr. Nordale?

A. Well, I don't know who the property belonged to. I just told them in the office I cleaned that up, and whoever it belongs to, you better collect that.

Mr. Taylor: You may take the witness.

Mr. Johnson: That is all.

(Whereupon, Mr. Adolph Wehner was excused as a witness and left the witness stand.)

Mr. Johnson: May we have a short recess?

The Court: Yes. Until 20 after.

(Whereupon, Court was recessed for ten minutes.)

The Court: Counsel ready to proceed?

Mr. Johnson: We are ready, your Honor.

Mr. Taylor: Ready, your Honor.

Mr. Johnson: I would like to call Oscar Engstrom.

OSCAR ENGSTROM

called as a witness [121] on behalf of the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. Oscar Engstrom.

Q. And where do you reside, Mr. Engstrom?

A. Well, at the present time at Hot Springs, Alaska.

Q. And how long have you lived in Alaska?

A. I came here in 1904 from Dawson.

Q. In 1904? A. 1904; yes.

Q. Are you acquainted with the property that is involved in this law suit, which is generally known as Lot 6 in Block 4 of the Town of Fairbanks?

A. I was, at one time.

Q. What is that?

A. I was acquainted with it at one time.

Q. Well, when did you first become acquainted with it?

A. The first day I was in Fairbanks I got a job wheeling sawdust at Carroll and Parker saw mill.

Q. The Carroll and Parker saw mill—is that what you are referring to? A. Umhummm.

Q. Where was that located?

A. Well, on the corner of First and Lacey.

(Testimony of Oscar Engstrom.)

Q. On the corner of 1st and Lacey? Was that on this Lot 6, Block 4? A. Yes.

Q. Would that be the Northwest corner of First Avenue and Lacey Street?

A. It would be.

Q. How was the saw mill situated on the lot, do you remember?

A. Yes. The boilers was facing First Avenue and the mill behind the boiler, and the saw rig behind that. The saw and the carriage.

Q. Behind the mill part?

A. Close to the stream.

Q. And what was beyond the saw and carriage, next to the river?

A. That was where they pulled up the logs and lowered them on the carrier.

Q. What kind of a rig did they have for doing that? Was there some sort of a structure that they pulled the logs up on?

A. A skid; chute.

Q. Kind of a chute? A. Yes.

Q. Was that built down into the river at an incline? A. Yes, sir.

Q. And did the mill occupy the whole lot as it then existed, [123] from First Street to the river? That is, I mean all of the whole mill, together?

A. It did.

Q. And you say your job was to haul sawdust?

A. Hauling sawdust.

Q. Where did you wheel it to, from the mill?

(Testimony of Oscar Engstrom.)

A. Mostly on First Avenue, west of the mill. The plots where the U.S.O.—between there and where the U.S.O. would be.

Q. I see. What was the reason for doing that?

A. There was a deep hollow there.

Q. And they were building that up to make a street?

A. They were doing that to level up the street.

Q. Did you ever haul any sawdust or dump any sawdust into the mill pond? A. No.

Q. Do you know whether or not any slabs or anything of that sort were ever dumped into the mill pond?

A. No, I don't. Not while I was there.

Q. How long did you work at the mill?

A. Well, I started sometime—I don't know the dates now, but the latter part of September, and worked to the middle of November, I should say.

Q. That was in the year 1904?

A. Yes, 1904. [124]

Q. And during that time, when you were hauling sawdust away from the mill, it was all dumped into the First Avenue, or what is now known as First Avenue?

A. It was First Avenue, and there was lots of building there, and also stock pile on the street where the teamsters loaded sawdust to haul it all over town. The whole town was building at that time.

Q. And what sawdust you didn't use to dump in

(Testimony of Oscar Engstrom.)

this hole in First Avenue was stockpiled and later sold to people who were building, is that right?

A. Well, the way I think it was that the stock pile had to be there first—a certain amount of sawdust—ready for sale, and the rest of it was dumped into the street to fill up the street. I believe Carroll, the business manager, had a contract with the City to fill up that, and he also sold the rest of the sawdust.

Q. What they didn't use in that hole on First Avenue was sold and hauled away, is that right?

A. That is right.

Q. How long did you stay around Fairbanks after you quit work at the sawmill?

A. Well, I didn't stay very long around Fairbanks. I took in the Bonnifield Stampede.

Q. Well, while you were working at the saw mill, did you notice any action of the river on this mill pond? Did it seem to [125] be filling up, or anything, from silt?

A. No, not at that time. The pond was pretty quiet there. I helped to pull the logs out of the mill pond up to the time it froze up.

Q. And since that time you have been more or less away from Fairbanks proper, isn't that right?

A. Clear up after Christmas. I tink I was out around the Cleary District, possibly.

Q. Have you had any occasion to notice that property since you quit working at the saw mill? I mean, pay any particular attention to it?

(Testimony of Oscar Engstrom.)

A. No, I never really had any occasion, because I never thought of it any more. I stayed in Fairbanks lots of times.

Q. But you haven't paid any particular attention to it since then? A. No.

Mr. Johnson: Cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Mr. Engstrom, were you subpoenaed to appear here?

A. I was called here by Mr. Nordale to be here; yes.

Q. Did you go down to the land back of the Nordale building on First Avenue since you knew you were going to testify?

A. No. I haven't been around there. Last time I was going [126] by there it was just about when the dog races was going on. I stayed at the hotel at that time.

Q. That was when the Nordale Hotel was on First Avenue?

A. No. I mean this Spring, the last time. I stayed over on the present Nordale, and walked down Lacey Street and looked at the dog races.

Q. There was considerable snow on that land that time that you wouldn't really get much of an idea as to the change, then?

A. No, I wouldn't.

Q. Was it possible for any of that sawdust that you were dumping into the hole on First Street, the

(Testimony of Oscar Engstrom.)

rains or the surface water wash that into that little bite where the logs used to be—where you would haul the logs up?

A. No, it couldn't, because the pit was laid under the saw and I wheeled it from there and over to and up First and in that way.

Q. That was nothing went into the river that you know of?

A. There was nothing went into the river that I know of.

Q. Now, calling your attention to where they brought the logs up to the slip, wasn't there a little bite come in off of the river; some slack water?

A. (Witness shook his head.)

Q. You just pulled them right out of the river into the slip?

A. Well, there was one man that hooked the tongs, and another pulled them up; yes. That is all. [127]

Q. Isn't it a fact there was a kind of an eddy come into the slip?

A. Yes, there was an eddy there. Didn't take much movement to haul them.

Q. Fairly quiet water in there?

A. Quiet water.

Q. How far did that little bite extend in there from the true bank of the river?

A. Well, it was built on top of the bank of the river and sticking out, more of a slope. The bank was standing just about perpendicular.

(Testimony of Oscar Engstrom.)

Q. I mean, how far did this slack water extend up in towards the saw mill, or past the mill?

A. It must have been a hundred feet or more that we had. Straight out towards the river.

Q. Lacey Street came right down to the water?

A. I assume so. There wasn't much of a street at that time.

Q. But there was a thoroughfare—there was a way to get down there, is that right?

A. Well, I don't think there was anything driving down Lacey Street below First Avenue. And I don't think—I believe, if I recall right, Lacey Street was a lot of stumps at that time.

Q. Was you there when they cleared the stumps off? [128] A. No.

Q. You don't know whether they throwed them in that slough or not?

A. I don't think so. Right there where the mill was, they had some lumber there, I guess, alongside the mill. I don't know if it was on the street, but they didn't have much stock pile. They sold the lumber as fast as it was sawed.

Q. Where did they have the lumber yard there, Oscar?

A. They didn't have much of a lumber yard there, because they sold the lumber.

Q. That they had to take and pile up? Took it away from the mill and took it to pile it up for people to haul away. Where did they take it, on Lacey Street, or on the west side of the mill?

(Testimony of Oscar Engstrom.)

A. Well, on this side of the mill, what you call the west side of the mill, there was a space there between the mill, this way, and that is where the saw pit was and the lumber went straight out. There was some lumber there, and some on the other side.

Q. But the demand was so great you didn't accumulate a great deal of lumber, is that right?

A. No, they didn't.

Mr. Taylor: That is all, Oscar.

Mr. Johnson: That is all.

(Whereupon, Mr. *Adolph Wehner* was excused as a witness [129] and left the witness stand.)

Mr. Johnson: Mr. Preg.

LEO PREG

called as a witness on behalf of the Plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. Leo Preg.

Q. How do you spell that last name?

A. P-r-e-g.

Q. Where do you live, Mr. Preg?

A. Here in Fairbanks.

Q. Fairbanks, Alaska? A. Yes.

Q. How long have you lived in Fairbanks?

A. Since 1903.

(Testimony of Leo Preg.)

Q. And you have lived in the town continuously since that time, is that right?

A. Most of the time. Sometimes in the summer I go out for a few months.

Q. I mean, this has been your home since 1903?

A. Oh, yes.

Q. Now, in 1903, when you first came here, how soon after that did you become acquainted with Carroll and Parker? [130]

A. Well, I came with them from Dawson.

Q. Oh, you came over with them from Dawson?

A. Yes.

Q. Well, you were working with them at the time they built their saw mill?

A. Yes, I had been working for them a whole year.

Q. And when did they build that saw mill, do you remember?

A. Right away. A week after we landed here. They bought the lot and we moved over from Graehl and started to put the plant up as far as we could go.

Q. Whereabouts was this lot that you speak of?

A. That is the corner of First and Lacey.

Q. What corner would that be?

A. That would be the northwest corner.

Q. Is that the lot that is in question in this case, Lot 6 in Block 4, of the Townsite of Fairbanks?

A. Yes.

(Testimony of Leo Preg.)

Q. After the mill was constructed, what part of the lot did it occupy?

A. It occupied pretty nearly the whole lot.

Q. Well, would that be from north to south?

A. Right from—it was about ten feet from the river bank. The back end.

Q. And clear up to First Avenue? A. Yes.

Q. And about how wide a space on the lot did you use, could you remember?

A. Well, it was right on the line with Lacey Street. And then (interrupted).

Q. West?

A. Oh, I don't know how many feet it would be. There was a place to pull the logs up and pull them on the carriage.

Q. Was that a slip built from the mill down into the water? A. Yes, it was a slip.

Q. What was the type, or what was the condition of the bank on the north side of the lot—that is, the bank of the river? Was it steep or gradual?

A. It was fairly steep. A little slope.

Q. And down that bank you had your slip, is that it? A. Yes.

Q. Into the mill pond? A. Yes.

Q. Now, how long did you operate the mill after you got it started? Do you remember?

A. Well, in 1903, after we had the plant set up, Parker and I went up the slough and cut some logs.

Q. Oh, I see, so you——

A. (Interposed): We had another man with

(Testimony of Leo Preg.)

us and we brought them down and sawed them up.

Q. Umhummm. Now, as you sawed up these logs, and as the mill [132] was operating, what, if anything, was done with the sawdust and slabs?

A. They were wheeled out into the street.

Q. They were wheeled out into the street?

A. I did some of it, myself.

Q. Were any of the sawdust or slabs ever dumped into the mill pond? A. Oh, no.

Q. Was that kept clear all of the time?

A. Kept as clear as we possibly could.

Q. Yes. Now, did you notice any action of the river on this particular mill pond as time went on?

A. Oh, yes. In 1904 I done the logging for them. For Carroll and Parker. I got 4 or 5 men up and cut logs and bring the drive down. And they sawed them up. We bring most every week a drive of logs; from the start the pond was three and a half to four feet deep. It was a fine pond. But then she gradually filled up through the summer and—(interrupted).

Q. What caused it to fill up?

A. Oh, silt.

Q. Silt that was coming down the river?

A. Yes. Further back from the pond. It all drifted up there.

Q. Was anything being dumped in there by anybody? [133] A. No.

Q. From Fairbanks?

A. No. No. And the last drive I brought down we had a hard time to get them in.

(Testimony of Leo Preg.)

Q. Because it had filled up so much with silt?

A. Probably a foot of water left there. The big ones we had to roll over the muck.

Q. I see. Now, after the saw mill was taken away, or was torn down?

A. Well, I don't know anything about after 1904. I left then, you know.

Q. Well, you left the saw mill?

A. I left. I went—(interrupted).

Q. But you didn't leave Fairbanks, did you?

A. Oh, no, but I took a job with the Road Commission.

Q. I see. Did you have any occasion to observe this lot after the sawdust—I mean, the saw mill was taken away?

A. Oh, yes, they were building up. All summer, build up and build up.

Q. Do you remember when Vachon and Sterling built their building?

A. Yes, I remember.

Q. That is the building that is on there at the present time, isn't it? A. Yes.

Q. And as time went on, what, if anything, happened to the [134] river right back of this lot? Did it move over or did it stay there, or did it build up, or what happened?

A. The river moved north.

Q. Towards Slaterville? A. Yes.

Q. And did the south bank, or left—it would be the left bank of the Chena River, build up behind Lot 6? A. Oh, yes.

(Testimony of Leo Preg.)

Mr. Taylor: Just a moment, I am going to object to a leading question, your Honor.

The Court: Objection sustained.

Q. What, if anything, happened to the Lot 6, with respect—or, what, if anything, happened to Lot 6 as the river moved over? Do you know?

A. What do you mean?

Q. As the river moved—I believe you testified that the river gradually, over a period of years, moved from the south to the north, that is?

A. Yes.

Q. Over towards Slaterville, is that right, the channel of the river?

A. Yes, the main channel moved over that way; yes. Built up right along around there.

Q. What do you mean it filled up around there?

A. With silt. [135]

Q. Was that on this lot 6 that you speak of?

A. And that lot farther back, where the playground is now. That was all water before. Where we would bring the logs in.

Q. But now, over a period of years, that has filled in, is that right? A. Oh, yes.

Q. Has that been due to the action of the river?

A. Why sure. Nothing else.

Q. Nothing else. Were you in Fairbanks in 1915, Mr. Preg? Were you living here in 1915?

A. Oh, yes; yes.

Q. I will show you Plaintiffs' Identification "2" and I will ask you if you recognize that?

(Testimony of Leo Preg.)

A. Yes. Yes. I recognize that.

Q. Can you point out on that picture the location of the lot where the old saw mill used to be? Can you tell where it is on that? A. No.

Q. Do you see this line here (indicating)? This looks like a pipe line? A. Yes.

Q. Have you—do you know what that is?

A. That is the pipe line that came from the laundry. They put it in. [136]

Q. Where did that pipe line run?

A. It run down to the river.

Q. On what street? A. Lacey Street.

Q. On Lacey Street? A. Yes.

Q. Did it run by the lot where the saw mill used to stand?

A. Yes, right along the saw mill.

Q. Right along the lot where the saw mill was?

A. Right along, on the street.

Q. Well, now, would this building just to the right of that pipe line—would that be the building that is now there?

A. Oh, it would be the building.

Q. Where the old saw mill stood?

A. Yes.

Q. Do you recall what, if anything, happened to that pipe line from year to year?

A. It got covered up with mud.

Q. What did they have to do about it, then?

A. Well, they had to extend it further down to the water. Every year.

(Testimony of Leo Preg.)

Q. Every year they had to keep extending it?

A. Yes.

Q. And adding to it in order to reach the water?

A. Yes. [137]

Q. Would you say that this was a correct representation of the water front in Fairbanks in 1915?

A. Oh, yes. That is pretty much the same.

Q. And you distinctly remember this pipe line?

A. Oh, yes; yes.

Mr. Johnson: We would like to offer, again, your Honor, Plaintiffs' Identification "2."

Mr. Taylor: No objection.

The Court: It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "I."

(Plaintiffs' Identification "2" admitted in evidence as Plaintiffs' Exhibit "I.")

Q. Did you used to live down near this lot where the saw mill used to be?

A. Well, not at that time. I lived over there on Lacey Street between Second and First.

Q. When was that?

A. Where the custom office is now. In that lot.

Q. I see, and when was that?

A. Oh, that was in '41. I put that building up.

Q. You put that building?

A. I built that building and sold it to him.

Q. Were you living there at that time?

A. The house where I am living in now, I moved it away from there and moved it over to Second.

Q. Have—or, rather, has the Town of Fairbanks

(Testimony of Leo Preg.)

been subject to water floods from time to time during the years since you have been here?

A. Oh, yes; sure.

Q. Have you had occasion after, to notice whether or not any soil was deposited by reason of high water? Along the left bank of the Chena River?

A. That is where it came from, from the high water.

Q. And the soil was deposited from these?

A. In 1904 and '05 they were mining in Fairbanks Creek and ground sluice, and the water would just stink when it would come down.

Q. That is the water of the Chena River was very muddy, is that right?

A. Oh, yes.

Q. And how often have we had floods here in Fairbanks, that you know of? How often would you say?

A. Oh, about every year or two. High waters. The first few years what we called the June freshet. That was right every June and the end of June for several years, and that was pretty high.

Q. Would that be in addition to the high water that usually came at break-up time?

A. Well, that was in addition; yes, and then sometime you get a heavy rain, why, then, you have pretty high water, too. [139]

Q. And after they built this dyke out on the Tanana along the Tanana, did that have a tendency to reduce the flood waters in the Chena River?

A. Yes, to a certain extent, but generally when

(Testimony of Leo Preg.)

the heavy rains come, they come from the head of the Chena. That is where the most water comes from.

Q. And then we get high water, is that right?

A. Yes.

Q. Like last Spring, for instance?

A. Oh, yes.

Mr. Johnson: You may cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Mr. Preg, you was mentioning a bank that was right back of the saw mill that you say went down fairly steep to the mill pond? A. Yes.

Q. How high was that bank?

A. Oh, I guess it was at that time about 7 or 8 feet.

Q. From the water up to the top of the bank?

A. Ya.

Q. Did that bank keep crumbling off into the slough? A. No.

Q. Or into the bite? A. No. [140]

Q. It stood up pretty straight?

A. It stood up pretty good.

Q. Was it on a little angle? A. Yes.

Q. And was you wheeling sawdust there at the same time Oscar was?

A. No. Oscar started in 1904.

Q. And what year was——

A. I was in 1903. When we started the saw mill.

Q. Now, you say this bite in there where you

(Testimony of Leo Preg.)

used to bring the logs in, was about three and a half or four feet deep?

A. Yes, from the starter.

Q. Now, that silt coming in there, did it fill it up to make any bars in that little bite there, so you could see the land had formed above the water?

A. Well, you see, it built up clean out all around there; them ponds, you know, we had out there to bring the logs in there. Kind of helped to get the water there to settle and that was building up all along.

Q. I mean, did it ever pile up to the time you could see the ground was above the water, and the water had disappeared?

A. No, there was always water enough at that time, but of course later years, it built up and built up.

Q. Don't you think part of that was built up by people dumping things in there? [141]

A. I don't think so.

Q. You don't think so? I mean, after the mill was taken away and they didn't need that pond?

A. Well, the pond was pretty full. I know the last time we brought the logs down, we had a hard time getting them in because the pond had filled in with sediment.

Q. That could have been, Mr. Preg, due to the fact the time you brought your last boom down you might have had real low water? A. Yes.

Q. Your water varies from day to day, does it not?

(Testimony of Leo Preg.)

A. Yes. As I say, it was low water and the pond was low.

Q. Your water would be correspondingly lower in the pond. But still, as low as it was, you could still get the logs in? A. Yes.

Q. Just the same as this pipe line; isn't it a fact that when the water got real low, which I would say it was at the time this was taken, October 15, you would have to extend this pipe line out farther so you could syphon the water up to the laundry?

A. Yes, because the pipe line got covered up with silt.

Q. And other times, possibly in June, you could cut that pipe line way off up by the edge and you still got lots of water?

A. Well, of course they got lots of water then, but some of it get covered up and they want more water, the next year [142] they have to build further out and dig down.

Q. Now, of course, the debris and silt and alluvial deposit coming down the river would naturally lodge in front of that pipe, wouldn't it? It would act as a precipitant for that silt and sand?

A. Yes.

Q. Now, according to your opinion, then, Mr. Preg, there is as much water in the Chena River now as there was in those days?

A. Oh, just about, I guess.

Q. You were here last year when we had the big flood? A. Yes.

(Testimony of Leo Preg.)

Q. And there was about as much water in there as the high water when it would break up another year? A. Oh, yes.

Q. Now, how far—about how far did you think the river moved north, Mr. Preg?

A. I think it moved—cut that bank on the north side at least fifty feet.

Q. Right straight across from the mill?

A. Yes. Yes. All along from Noyes Slough, down around.

Q. I mean, in the Chena right straight across from the mill? A. Yes.

Q. Has it moved back now to the south?

A. The river? Well, it came around the bank and then come towards the town where that turn is.

Q. Now, this Plaintiffs' Exhibit "I"—now, you see the banks of the river here, Mr. Preg (indicating)? A. Yes.

Q. And here is a large tree here (indicating)?

A. Yes.

Q. And just a short ways from the river?

A. Yes.

Q. And this was taken in 1915. That was quite awhile after you worked there? A. Oh, yes.

Q. But that river never moved over to take that tree out, did it?

A. Well, I don't know. There have been a lot of trees laying on the other side, there.

Q. I mean, it hadn't by 1915?

(Testimony of Leo Preg.)

A. I don't know, I didn't pay any particular attention.

Q. Don't you believe your reason for believing that is the fact the silt moved over here, filled in here (indicating), making a wider beach over here, made you believe the river moved over?

A. It did move over. The hot house of Carl—it moved back from the bank and it washed all out about fifty feet. Washed away over there.

Q. This filled up over here on this bank (indicating), it would naturally crowd the river over, wouldn't it? [144]

A. Yes.

Q. Now, have you ever been down around the land back of Lot 6 of Block 4, back to that building that belongs to Mr. Nordale?

A. Oh, yes, lots of times.

Q. You go down there quite often?

A. Yes.

Q. And was you ever down there at any time you seen old refuse and debris being dumped into a kind of a depression back of the building?

A. Not at the back of the building.

Q. Not at the back of the building?

A. Well, there was some cans and things, like they do now. Now they throw more bottles away than cans, but nothing to do any harm.

Q. You never knew about after a fire, of a lot of old burned iron bedsteads being thrown in there?

A. No.

Q. A lot of old wagon tires? A. No.

(Testimony of Leo Preg.)

Q. You think all that fill that was in the mill pond back of the mill was put in there by the high water? A. Yes.

Q. How high would you think it was from the ordinary water level up to where Mr. Birklid and Waxberg's building is located [145] now? How much higher do you think that is from the water level?

A. From the water level? Oh, that must be four feet, if not more.

Q. And you think the river has built that up?

A. Oh, built it further out from where he is, and back towards the bank, towards the south there, I guess. It built up the whole bank along there.

Q. You say it caved down?

A. No, built up.

Q. Oh, it built up? A. Yes.

Q. Well, I will call your attention to Plaintiffs' Exhibit "H." Now, could you show on the map there, indicate on the map where that has built up? You say that has built up?

A. Well, it built up right from the lot down.

Q. Well, here, we will say is the lot (indicating). Here is the mill or where the mill—yes, here is the mill. It built up through here (indicating)?

A. Yes, through there.

Q. Do you recognize this building here, Mr. Preg? A. Which one?

Q. That large building (indicating)?

A. Well, I think that was the hotel.

(Testimony of Leo Preg.)

Q. And then it filled up all in here (indicating) ?

A. Yes, I know they had a fireplace underneath there, and then when high water come it filled up the fire box and all water clear up, they couldn't make no more fire, but it had built up there. More every year.

Q. Then they put in a levy there? A. Yes.

Q. Do you remember when that was put in?

A. Oh, I don't remember just when they put that in.

Mr. Taylor: I believe that is all, Mr. Preg.

Mr. Johnson: That is all, Mr. Preg.

(Whereupon, Mr. Leo Preg was excused as a witness and left the witness stand.)

The Court: We will take a recess until tomorrow at 10:00 o'clock.

(Whereupon, at 5:00 o'clock p.m., Court was adjourned until 10:00 o'clock a.m., on the 10th day of May, 1949.)

Be It Remembered, that upon the 10th day of May, 1949, at 10:00 o'clock a.m., the above-entitled trial before the Court was continued, the parties being present in court in person and by their attorneys of record, as were present on the first day of the trial;

And Thereupon, the following proceedings were had:

The Court: Counsel ready to proceed with the trial of Nordale versus Waxberg? [147]

Mr. Johnson: Plaintiffs are ready, your Honor.

Mr. Taylor: Defendants are ready, your Honor.

The Court: Very well, call your witness.

Mr. Johnson: Mr. Reuel Griffin.

REUEL GRIFFIN

called as a witness on behalf of the Plaintiffs, was duly sworn and testified.

Clerk of Court: Plaintiffs' Identification Numbers "16," "17," "18" and "19."

(Plaintiffs' Identifications "16," "17," "18," and "19" were marked.)

Direct Examination

By Mr. Johnson:

Q. Will you state your name, please?

A. Reuel Griffin.

Q. Where do you reside, Mr. Griffin?

A. 550 Second Avenue.

Q. Fairbanks, Alaska? A. Yes.

Q. What is your business?

A. Merchandise.

Q. Are you also engaged in the photographic business? A. Yes, sir.

Q. A professional photographer?

A. Yes, sir. [148]

Q. Operating in Fairbanks?

A. Yes, sir.

Q. Were you engaged as a professional photographer in May and June of 1948? A. Yes, sir.

(Testimony of Reuel Griffin.)

Q. Are you acquainted with the property known as the Nordale properties, located on the northwest corner of First and Lacey Streets in Fairbanks?

A. Yes, sir.

Q. Did you—or were you acquainted with that property last May or June, in 1948? A. Yes.

Q. During the month of May and June, did you at my request, take some photographs of the building and surrounding area of the building known as the Waxberg and Birklid building, which is situated just behind the Nordale building on that property?

A. Yes, sir.

Q. Was that during the high water period in the Chena River? A. It was during——

Q. That is, it was during the flood period?

A. Yes.

Q. I will show you Plaintiffs' Identification "16," and will ask you to tell the Court what that is, if you know?

A. That is a photograph of the Waxberg and Birklid building. [149]

Q. Was that taken by you? A. Yes, sir.

Q. Do you remember the date that it was taken?

A. I noted the date on the back of the print.

Q. What date is that?

A. That is May 15, 1948, 5:15 p.m.

Q. Does that purport to represent the subject matter as it existed at the time that it was taken?

A. Yes.

(Testimony of Reuel Griffin.)

Q. Is that a true and correct picture of the building and surrounding area at that time?

A. Yes.

Mr. Johnson: We would like to offer Plaintiffs' Identification "16," if the Court please.

Mr. Taylor: We object, your Honor, upon the grounds incompetent, irrelevant and immaterial, and don't see that it goes to prove any of the issues in this case.

Mr. Johnson: Well, if the Court please, it shows the relationship between the two buildings for one thing, and it shows the high water proceeding up to the building during the flood stages.

The Court: Objection overruled. It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "J."

(Plaintiffs' Identification [150] "16" admitted in evidence as Plaintiffs' Exhibit "J.")

Q. I will show you Plaintiffs' Identification "17," Mr. Griffin, and will ask you to tell the Court what that is?

A. That is a picture of the Waxberg and Birkliid building taken from the west side.

Q. Would that be the opposite side of the picture shown in Plaintiffs' Exhibit "J"?

A. Yes, sir.

Q. This was taken from the east side?

A. Yes, sir.

Q. When was that taken?

A. It was taken May 15 at about 5:15 p.m., also.

(Testimony of Reuel Griffin.)

Q. By whom was it taken? A. By me.

Q. Is that a correct representation of the buildings and surrounding area at that time?

A. Yes, sir.

Mr. Johnson: We would like to offer in evidence Plaintiffs' Identification "17," if the Court please.

Mr. Taylor: No objection, your Honor.

The Court: It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "K."

(Plaintiffs' Identification "17" admitted in evidence as Plaintiffs' Exhibit "K.") [151]

Q. Mr. Griffin, I will show you Plaintiffs' Identification "18," and I will ask you to tell the Court what that is, if you know?

A. This is a picture of the Waxberg and Birkliid building taken at a later date during the flood in the Spring of 1948.

Q. Does that show the water higher than it was on the other two pictures? A. Yes, sir.

Q. What date was it taken?

A. It was taken May 20, 1948.

Q. And by whom? A. By myself.

Q. And from what direction was it taken?

A. That was from the southwest corner.

Q. Of the——? A. Of the building.

Q. Waxberg and Birkliid building?

A. Yes.

Q. Is that a true and correct representation of the subject matter as it existed at that time?

A. Yes, sir.

(Testimony of Reuel Griffin.)

Mr. Johnson: We would like to offer in evidence Plaintiffs' Identification "18."

Mr. Taylor: If the Court please, I am going to object [152] to the introduction of this exhibit upon the ground it was made after the joinder of issues in the case now before us, and would have no bearing upon, or go to prove none of the issues of the case, which were joined at that time.

The Court: Objection overruled. It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "L."

(Plaintiffs' Identification "18" admitted in evidence as Plaintiffs' Exhibit "L.")

Q. Mr. Griffin, I will show you—pardon me (paused). Mr. Griffin, I will show you Plaintiffs' Identification Number "19," and will ask you to tell what that is?

A. I was asked to take a photograph of footings and surrounding area of the Waxberg and Birkliid building showing accumulated sediment.

Q. After the water had receded?

A. Yes, sir.

Q. When was that picture taken, if you know?

A. The picture was taken June 5, 1948.

Q. By whom? A. By myself.

Q. Now, what portion of the Waxberg building is shown in that picture?

A. This is the footing, foundation footing of the southwest corner of the building.

Q. And does it show the immediate surface of the earth around [153] that footing? A. Yes.

(Testimony of Reuel Griffin.)

Q. Does that picture represent a true and correct photograph of the subject matter at the time?

A. Yes, sir.

Q. Did you have occasion to measure the depth of the sediment that had accumulated on the footing?

A. Yes, sir, I was asked to, and I did.

Q. Do you recall what the depth of that sediment was?

A. Well, the concrete footing was about 2 and a half inches.

Mr. Johnson: We would like to offer in evidence Plaintiffs' Identification "19."

Mr. Taylor: If the Court please, I am going to object to the admission of the identification because there is no showing of any sedimentary deposit prior to the joinder of the issues in this case, and it would be incompetent, irrelevant and immaterial to prove any of the issues in this case. I think any pictures of any sedimentary deposits in surrounding areas should have been made prior to the instigation of this action.

The Court: Objection overruled. It may be admitted.

Clerk of Court: Plaintiffs' Exhibit "M."

(Plaintiffs' Identification "19" admitted in evidence as Plaintiffs' Exhibit "M.")

Mr. Johnson: You may cross-examine. [154]

(Testimony of Reuel Griffin.)

Cross Examination

By Mr. Taylor:

Q. Mr. Griffin, you say that this Plaintiffs' Exhibit "J" was taken on June 15, 1948?

A. I will have to see the date. This was taken on May 15, 1948.

Q. And did you take any pictures of any other property down in that particular part of town?

A. I don't recall.

Q. Did you pay any attention over on what is known as the Children's Playground, if that area was covered with water?

A. No, sir.

Q. Did you look?

A. No, I didn't.

Q. And you were standing in Lacey Street when this was taken? Or across Lacey Street?

A. I believe that the water came up into the street and I was standing in the street that actually runs more or less east and west.

Q. Wendell Avenue?

A. I guess so.

Q. Well, this—in front of Waxberg and Birkliid building is Lacey Street, running north and south?

A. Yes, that is the end of Lacey Street there (indicating).

Q. Plaintiffs' Exhibit "K," that was taken at the same time, [155] was it? On May 15, 1948?

A. Yes, the same trip.

Q. Was that prior to the water's reaching its highest level, or was it the low?

A. That was prior to its having reached its highest level.

(Testimony of Reuel Griffin.)

Q. And what were you standing on when that picture was taken, Mr. Griffin?

A. I was up on the bank back of the U.S.O. building.

Q. Now, calling your attention to Plaintiffs' Exhibit "L," will you state if that is the highest point that the water reached during that flood?

A. I am not sure whether that is the very highest it reached, but I was asked to go down and take this picture after I had taken those, because of the water having risen higher.

Q. While you were down there that time, did you see any other buildings that were flooded out upon Wendell Avenue?

A. There was a small M.P. station, or some sort of building sitting out in the water there at Lacey and Wendell.

Q. Well, over towards the ball park, looking east on Wendell, was there a number of those buildings that were flooded? A. I really don't recall.

Q. Well, I am calling your attention to the car pound you have down there. Wasn't there a number of those cars under water? [156]

A. I am sure there was.

Q. Could you tell how far up in this building that water was, from the floor? A. No.

Q. Now, this picture, Plaintiffs' Exhibit "M," was taken on the—June the 5th, is that right? And how deep was the sediment where the grass was, Mr.—?

(Testimony of Reuel Griffin.)

A. I know that this old shoe that had been laying on top of the ground was about covered over, and there was sediment on top of the grass which was—had been bent over and weighted down by the sediment. The only measurement I took was of the sediment on top of the concrete footing under this corner of the building, and that was about two and a half inches.

Q. Now, isn't it possible that there could have been dirt on that concrete footing before the flood?

A. It is possible.

Q. And it would be soaked up and you could take a measurement and it would show two and a half inches, but there might only be one and a half inches of sediment deposited by the flood?

A. I don't know how much was deposited by that particular flood. I just measured the sediment on the footing.

Q. Now, calling your attention to the old shoe here, doesn't it appear to you in there that possibly a half an inch or [157] less of sediment is on top of that shoe?

A. Well, the shoe is practically buried.

Q. Well, the shoe was in there quite a while, wasn't it?

A. Perhaps it was.

Q. The sediment—if it run off the shoe, it would be deeper on either side?

A. I would think it would take at least two inches of sediment to take that shoe at a point, unless it had been buried.

(Testimony of Reuel Griffin.)

Q. The shoe was quite a battered old shoe, was it not?

A. It was apparently, a large man's shoe.

Q. Now, how was this sediment, wet and damp at the time you went down? A. Yes, sir.

Q. And hadn't settled, yet?

A. Well, it apparently had settled.

Q. Have you been down there since you took these pictures, Mr. Griffin? A. No.

Q. Since this sediment dried? A. No, sir.

Q. You don't know how deep it is now, then?

A. No.

Q. You don't know whether it appeared like that or whether it appeared there had never been any sediment? A. That is right. [158]

Mr. Taylor: That is all.

Mr. Johnson: That is all, Mr. Griffin. Thank you.

(Whereupon, Mr. Reuel Griffin was excused as a witness and left the witness stand.)

Mr. Johnson: If the Court please, I would like to recall Mr. Lee Linck for some questions.

The Court: Very well.

LEE S. LINCK

having previously been duly sworn, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination on Recall

By Mr. Johnson:

Q. Your name is Lee Linck? A. Yes.

(Testimony of Lee S. Linck.)

Q. And you have testified in this case previously? A. Yes.

Q. And were sworn? A. Yes.

Q. Mr. Linck, did you, since you have testified here previously, have you, at my request, run some levels on the lot which is in question here? That is, levels from First Avenue down to the Chena River? A. Yes.

Q. And did you make notes of those levels as you took them? [159] A. Yes.

Q. I will show you Plaintiffs' Exhibit "G," and will ask you to indicate on that exhibit, if you can, where you took these levels and what they show as to the relative profile of that property.

Mr. Taylor: If the Court please, we are going to object to any introduction of any testimony along these lines unless it is shown by this witness that the conditions are the same now as existed at the times testified by the other witnesses for the Plaintiff.

The Court: Objection overruled.

A. Using the ground level on the southeast corner of Lot 6 as a point of beginning, we found that the elevation of the ground 86 feet south of that point and along the east line of Lot 6, was 1.6 feet lower than the starting point.

Q. Now, using the southeast corner as the starting point and at the mean level, zero, or whatever you would do, how far down did you go down for the first point on the east line of the lot?

(Testimony of Lee S. Linck.)

A. The first point was 86 feet.

Q. And what was the level at that point?

A. That is 1.6 feet lower than the southeast corner.

Q. Now, would you just indicate on this Exhibit about where it was?

A. Right here (indicating). [160]

Q. Put the level in there.

A. The next level we took was 118 feet from the point number 1, we will call it, starting point, and that was 5.9 feet lower than point number 1.

Q. Can you indicate that on this exhibit, now, about where it was?

A. (Indicated.) And the third was taken at 133 feet north of point number 1, and that was minus 4.4 feet. That is approximately in line with this building (indicating). And the fourth shot was taken at 210 feet north of point number 1, and it was 5.7 feet lower than shot number 1. That was approximately here (indicating). Then the sixth shot was 284 feet north of point number 1, and it was 6.5 feet lower.

The Court: How much was that?

A. 6.5 feet lower.

Q. Now, will you indicate where that is?

A. (Indicated.) The next shot we took is on the southwest corner of Lot number 6.

Q. Would that be at the water level?

A. No, that is at the southwest corner near the

(Testimony of Lee S. Linck.)

street, and that was .7 feet higher than shot number 1.

Q. Well, now, what do you mean "shot number 1"?

A. That is this, here (indicating). This point is seven-tenths of a foot higher than your first shot. Then your next point was taken approximately 132 feet north of the southwest [161] corner of Lot number 6.

Q. Along the west boundary?

A. Along the boundary, and that was 1.3 feet lower than shot number 1. And the next point taken was 153 feet north of the southwest corner of Lot number 6, and that was 6.5 feet lower than shot number 1, and the last shot was taken 1—205 feet north of the southwest corner of Lot 6 and that was 7.5 feet lower than shot number 1.

Q. Did you have occasion to run any other levels down through the center of the property?

A. No.

Q. You just ran them on the——

A. On the boundary lines.

Q. What is the general—from your examination, what is the general contour of the property between the two boundaries? Is it more or less level east and west?

A. There appears to be a depression immediately north and under a portion of the Nordale building.

Q. Is that much of a depression, or is it——

(Testimony of Lee S. Linck.)

A. Well, it varies. It is approximately 4 feet lower than the ground immediately south.

Q. But I am talking now about across the property, generally. Is it fairly level, so that there wouldn't be any high ridges down the center of the property? That is what I had in mind. [162]

A. No.

Q. Now, Mr. Linck, do you have in your possession a copy of the original survey notes that were made by the surveyor who laid out the Townsite of Fairbanks? A. Yes.

Q. Where did you obtain that copy?

A. From the City Engineer's Office.

Q. And have you examined those notes?

A. Yes.

Q. Recently? A. Yes.

Q. Do you recall, referring to Plaintiffs' Exhibit "F," and more particularly to Lot 6 in Block 4, do the notes describe the north boundary of that lot, as you examined them?

A. Yes, they do.

Q. And what do the notes say about that boundary and its reference to the meander line of the Chena River?

Mr. Taylor: We object. The original notes, your Honor, is the best evidence. We are going to object under the best evidence rule.

Mr. Johnson: If the Court please, it is used as a memorandum. He can testify that he examined.

The Court: These are just copies, are they?

(Testimony of Lee S. Linck.)

Mr. Johnson: Yes.

The Court: Objection sustained. [163]

Q. You have had occasion, and a good deal of experience, in surveying in and around Fairbanks have you not, Mr. Linck? A. Yes, sir.

Q. And from your experience can you tell, by examining this map, what the north boundary line of Lot 6—rather, how the north boundary line of Lot 6 corresponds to the meander line of the Chena River?

Mr. Taylor: If the Court please, I believe the exhibit speaks for itself.

The Court: Objection sustained.

Mr. Johnson: That is all.

The Court: Are you asking about the present meander line? Were you talking about the meander line that he, himself, knew?

Mr. Johnson: No, I was talking about the meander line of the original—that is shown on the original plat.

The Court: That is what I thought. Yes. My ruling was, the objection was sustained.

Q. You have seen, and when you made this survey and plat—the present meander line of the Chena River. How does that correspond with the north boundary of the property which you made and is shown in this plat?

A. We have indicated the north boundary of this plot of ground as the approximate meander line—the present meander line of the Chena River. [164]

(Testimony of Lee S. Linck.)

Mr. Johnson: Does the Court have any questions?

The Court: No.

Mr. Johnson: That is all, Mr. Linck.

Mr. Taylor: No questions.

(Whereupon, Mr. Lee S. Linck was excused as a witness and left the witness stand.)

Mr. Johnson: Oh, excuse me. The Plaintiffs rest.

Mr. Taylor: If the Court please, at this time I would like to move that the Plaintiffs' case be dismissed upon the ground there has been a total failure to prove the material allegations of the Complaint in that they have not proved that the building upon the land in question, which was built, was by accretion, as defined by law, a slow and imperceptible natural deposit of sedimentary matter of alluvial deposits. We feel they have failed to prove the material allegations.

The Court: Motion denied.

Mr. Taylor: I would like to call Mr. Waxberg.

A. E. WAXBERG

one of the Defendants, was called as a witness on his own behalf and was duly sworn and testified.

Mr. Taylor: If the Court please, I wonder if we could have about ten minutes? I expected it to be a little later than this before we got to our case. I have one witness here, I haven't talked to at all, yet.

(Testimony of A. E. Waxberg.)

The Court: Yes. We will take a recess until ten minutes [165] to 11:00.

(Whereupon, Court was recessed for ten minutes.)

The Court: Ready to proceed?

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. A. E. Waxberg.

Q. And where do you reside, Mr. Waxberg?

A. Graehl.

Q. And what is your occupation?

A. Carpenter.

Q. And are you in business in Fairbanks?

A. Yes.

Q. What type of business are you in?

A. General contracting.

Q. And do you have a partner? A. Yes.

Q. And what is the firm name of your—

A. Waxberg and Birklid.

Q. Where is—do you maintain a headquarters or shop here?

A. Yes, we have a shop on the base of the Chena.

Q. Where is that located, Mr. Waxberg?

A. At the end of Lacey and Wendell on the banks of the Chena. [166]

Q. And how long have you had the shop there?

A. Oh, approximately ten months.

Q. And which side of Lacey does the shop—is the shop situated?

(Testimony of A. E. Waxberg.)

A. It is on the left-hand of Lacey, facing the river.

Q. And about how far from the river?

A. Oh, I would say 60 feet.

Q. How did you acquire the land upon which your shop is located, Mr. Waxberg?

A. Well, I filed on it. I staked on it.

Mr. Johnson: Well, if the Court please, we object to that and move it be stricken—the answer—on the ground it is incompetent, irrelevant and immaterial. Not within the issues joined by the Pleading. Nothing in the Answer that says anything about staking.

The Court: It is correct, the Pleadings don't set up any right to the Defendant. Just deny the right of the Plaintiff.

Q. Now, Mr. Waxberg, when you went on the land—that is, where your building is located now, was there any improvement thereon? A. No.

Q. Was there any record in the—or did you make any search of the records of the United States Commissioner to ascertain whether or not that land was owned by any person? [167] A. Yes.

Mr. Johnson: We object to that, if the Court please, and move the answer be stricken, on the ground it is incompetent, irrelevant and immaterial. Not within the issues joined by the pleadings.

The Court: It may be stricken.

Q. Now, Mr. Waxberg, pursuant—or after you

(Testimony of A. E. Waxberg.)

secured this ground you then built your building?

A. Yes, we did.

Mr. Johnson: We object to that and move to strike the answer because there is no previous testimony that he secured the ground.

Q. After you went on the ground you built your building?

A. Yes, we moved part of it on there and added to it.

Q. And was you then enjoying the possession of the ground without any trouble?

Mr. Johnson: We object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: I think you have alleged that he ousted you and you denied that. Objection overruled.

Q. Did you have any trouble to get on that ground?

A. No. The only thing is the city called us when we moved the building over and wanted to know how—— (Interrupted.)

Mr. Johnson: We object to that, if the Court please; [168] incompetent, irrelevant and immaterial. Hearsay.

The Court: Objection sustained.

Q. When—where—how—where did you build the building that is on that lot now, Mr. Waxberg?

A. Where?

Q. Yes. A. I built it in Graehl.

(Testimony of A. E. Waxberg.)

Q. And how did you get it onto the—onto this land that is now in dispute?

A. I hauled it down the river and up onto the property where it is now located.

Q. And what was—if anything—was said to you by the Plaintiff in this case, regarding your house—your building being on that particular lot?

A. Well, I don't recall. He wanted us to move it off of there shortly afterwards, as near as I recall, and I couldn't see where he had any legal right—— (Interrupted.)

Mr. Johnson: Now, we object to that, if the Court please, and move to strike the answer as not being responsive.

The Court: It may be stricken.

Q. Now, did the city make any objections to you—— (Interrupted.)

Mr. Johnson: We object to that as being incompetent, irrelevant and immaterial. Purely hearsay. Not within the issues joined. [169]

The Court: Objection sustained.

Q. Mr. Waxberg, when you went on that ground that you claim, was there any improvements there, of any kind or nature on the ground?

A. No.

Q. What, if any, improvements was lying south of the building that you put up?

A. None that I noticed. There is an old building there.

(Testimony of A. E. Waxberg.)

Q. What was the foundation of that old building?
A. It is standing on piling.

Q. And how long are those piling, Mr. Waxberg?

A. Oh, I would judge—they vary. The ones in the middle of the building are possibly 6, 7 feet in the ground, and on the edges, why, that has been filled in on both sides so it is right up even with the edge of the building.

Q. Now, how much higher is the floor of that building than the floor of your building, Mr. Waxberg?
A. Roughly three feet.

The Court: How much?

A. Three feet.

Q. Now, calling your attention to Plaintiffs' Exhibit "G," to the various levels that was testified to by Mr. Linck this morning, would you state whether or not you have taken any levels on those particular points, or adjacent thereto?

Mr. Johnson: Well, if the Court please, we object to [170] that on the ground the proper foundation hasn't been laid. No showing he is qualified to take the levels in the first place, and if any levels were taken by anyone else, this isn't the proper testimony.

The Court: All right, objection sustained.

Q. Now, Mr. Waxberg, did you take any levels from a point by your building to the intersection of Lacey and First Avenue?
A. Yes.

Q. And—— (Interrupted.)

(Testimony of A. E. Waxberg.)

Mr. Johnson: We object to that and move to strike the answer for the reason previously stated, your Honor, that he isn't qualified or hasn't been shown to be qualified to take any levels.

The Court: All right, the answer may be stricken.

Q. Mr. Waxberg, are the levels taken by Mr. Linck approximately correct?

A. I would say so.

Q. And all of those levels, so far as you know, are correct, are they not?

A. I would say they are; yes.

Q. You have run levels, have you, Mr. Waxberg?

A. Yes, many times.

Q. And in your business you are required to do that? A. Yes.

Q. And you have leveled through on these things and that is [171] the reason you know that those things are approximately the levels?

A. That is right.

Q. Now, calling your attention to the building of the Plaintiffs which lies immediately south of your building, would you state whether the ground under the back end of their building is higher or lower than the ground where your building is?

A. It is lower; yes. There is water in there right now.

Q. But how much lower, Mr. Waxberg?

A. Oh, approximately two feet.

Q. And is that part of the building—what is

(Testimony of A. E. Waxberg.)

under the Nordale building—was that subjected to the overflow of water that was in there last year?

A. Yes, it was.

Q. And if any overflows, then, that come up this last year, or previous years, would naturally overflow into that natural depression, would it not?

A. Yes.

Q. And has that depression, or lower area south of you, has that ever filled with silt and alluvial deposits by the river?

A. Oh, I imagine to a certain extent; yes.

Q. Has it ever filled it up to the level of your land? A. No. [172]

Q. And this last fall—last summer, was there water underneath that building? A. Yes.

Q. Now, what is the character of the soil upon which your building is standing, Mr. Waxberg?

A. Well, as near as we can ascertain, it is, oh, rubbish and tin cans and fill. There is a certain amount of sediment and deposit.

Mr. Johnson: Now, we object and move to strike the answer on the ground no proper foundation has been laid. Nothing to show they made any tests.

The Court: All right, motion to strike granted.

Q. What, if anything, have you done to determine the character of ground claimed by you where your building is?

Mr. Johnson: If the Court please, we object to the use of the word “claimed.” There is nothing

(Testimony of A. E. Waxberg.)

in the pleadings that covers that. It is beyond the issues.

The Court: Objection sustained.

Q. Well, Mr. Waxberg, do you claim that land where your building is located? A. I do.

Mr. Johnson: We move to strike—object to that and move to strike the answer.

The Court: Sustained.

Q. What, if anything, have you done to determine the character [173] of the land where your building is located?

Mr. Johnson: We object to that, if the Court please, incompetent, irrelevant and immaterial. Not within the pleadings.

The Court: Objection overruled.

A. I have never made any definite survey, other than when we installed an oil tank there last fall for oil burners for heating the building. We did dig a hole in front of our building then, and put a 500 gallon tank in there.

Q. How deep was that hole, Mr. Waxberg?

A. Oh, six, seven feet.

Q. And what would you say as to the level of that hole with the level of the Chena River?

A. Approximately water level.

Q. And what was the character of the earth that you found at the bottom of that hole that was six or seven feet deep?

A. Well, it was all kinds of materials. There was tire rims and bedsteads and tin cans and logs

(Testimony of A. E. Waxberg.)

and oil barrels. There was an oil barrel close to the bottom of it that was standing straight up and down, full of rubbish.

Q. And you say that would be approximately—that the level of the river—the river level?

A. The barrel would be approximately the river level. Maybe a little bit higher than normal river level.

Q. And how big was that hole, Mr. Waxberg?

A. Why, I would say it was four and a half by seven feet.

Q. And that was big enough to contain a 500 gallon drum? A. Yes.

Q. Where was that hole in relation to the building—your building?

A. Just right in the front of the building.

Q. And how far would that be in back of the Nordale building?

A. 25 to 30 feet; something like that.

Mr. Taylor: Now, I would like to have that marked for Identification.

Clerk of Court: Defendants' Identification "A," "B" and "C."

(Defendants' Identifications "A," "B" and "C" were marked.)

Q. Now, Mr. Waxberg, I hand you Plaintiffs'—Defendants' Identification "A," and I ask you to state what that is.

A. Well, this is the hole that we dug to place our fuel oil tank in.

(Testimony of A. E. Waxberg.)

Q. And when was that hole dug?

A. I believe it was in September. I would have to check our records to give you a definite time.

Q. And who took that picture?

A. Earl Wyman.

Q. And under whose direction and authority?

A. I asked him to take the picture. [175]

Q. And is that a true representation or picture of that hole as it existed at that time?

A. Yes sir.

Mr. Taylor: If the Court please, we would like to introduce this in evidence.

The Court: What year was that?

Mr. Taylor: 1948.

A. 1948.

Mr. Johnson: Well, if the Court please, we object on the ground that it is incompetent, irrelevant and immaterial. No proper foundation has been laid for its introduction, and that is not within the issues joined by the pleading.

The Court: May I see it, Mr. Taylor?

(Mr. Taylor handed the picture to the Court.)

Mr. Taylor: If the Court please, we feel it is certainly within the issues, or the issue as to whether or not it is accretion at that particular point.

The Court: Is the hole clear down in this picture that was taken?

(Testimony of A. E. Waxberg.)

A. I don't believe so. He was still working in there. I think we went down a little lower. You will note in the left hand corner there is an oil drum. You can see the first rim of the drum. You know how they are made, and I think we went down a little further than that; about eight or ten inches. However, we have the other pictures showing [176] . . . (interrupted).

The Court: Objection overruled. It may be admitted.

Clerk of Court: Defendants' Exhibit Number "1".

(Defendants' Identification "A" admitted in evidence as Defendants' Exhibit "1".)

Q. Calling your attention to Plaintiffs'—or, Defendants' Identification—Exhibit "1", Mr. Waxberg, would you indicate on that picture where the oil drum that you mentioned—is located?

A. Yes, it is to the right of the shovel, here (indicating).

Q. Would it be all right to mark that with a pen, your Honor?

The Court: Yes.

Q. And would you state what was the character of the material that you shoveled off at the bottom of that hole, especially this dark colored material (indicating)?

A. Well, it is very obvious to be filled, because it is logs. You will note there is logs—there are two logs here and a short chunk of wood there along-

(Testimony of A. E. Waxberg.)

side the drum, and tin cans and tire rims and so on and so forth.

Q. What other stuff was in there, if you remember, Mr. —?

A. Well, that has been quite some time ago. I don't recall just what all was in. Just garbage. I mean, tin cans and stuff like that.

Q. I hand you Defendants' Identification "B", and ask you what [177] that is?

A. This is the material that was shoveled out of the hole.

Q. And when was that shoveled out, Mr. Waxberg?

A. At that time I was digging the hole.

Q. Last September, did you state before?

A. Yes, in September.

Q. And how deep was the hole at the time that picture was taken?

A. Well, we were just—the job was just about done. We did go down a little bit after that.

Mr. Taylor: If the Court please, I would like to have that introduced in evidence and marked Defendants' Exhibit "2".

Mr. Johnson: We object, if the Court please, on the grounds it is incompetent, irrelevant and immaterial. No proper foundation laid for its introduction.

The Court: May I see it, Mr. Taylor? (Pause.) Objection overruled. It may be admitted.

Clerk of Court: Defendants' Exhibit Number "2".

(Testimony of A. E. Waxberg.)

(Defendants' Identification "B" admitted in evidence as Defendants' Exhibit "2".)

Q. Mr. Waxberg, calling your attention to Exhibit—Defendants' Identification Number "2", would you state what those articles are that are on—that you took out of there?

Mr. Johnson: Well, if the Court please, I think the exhibit speaks for itself, now that it is introduced. He has [178] already explained.

The Court: Objection overruled.

A. There is lumber and—or old pieces of board and boxes, and also a bedstead and hoops from drums and barrel staves and stuff like that, and we have that, yet, in our possession that we can produce. I saved it.

Q. I hand you another photograph and ask you when that was taken and who by and under whose direction?

A. Well, this was taken by Earl Wyman at the same time these other pictures were taken.

Q. And was the hole about the same?

A. Well, we hadn't completed—I don't believe we had even got down to the drum at that time. I don't see it in this picture.

Mr. Taylor: If the Court please, I would like to offer this in evidence.

Mr. Johnson: Well, we object to it, if the Court please, on the ground it is incompetent, irrelevant and immaterial. No proper foundation laid and their appears to be a pick and shovel in the picture,

(Testimony of A. E. Waxberg.)

which I don't believe it was testified to as having been found in the hole.

Q. Was that pick and shovel in the hole?

A. Yes, we used the pick and shovel in the hole and we also left it in there for the taking of the picture for comparable—showing the depth of the hole, more or less. You [179] have to have something to show the depth of the hole, and it made a good background to indicate it.

The Court: Is the picture a true representation of the appearance of the hole at the time the photograph was taken? A. Yes.

The Court: Objection overruled. The picture may be admitted.

Clerk of Court: Defendants' Exhibit Number "3".

(Defendants' Identification "C" admitted in evidence as Defendants' Exhibit "3".)

Q. Calling your attention to Defendants' Exhibit Number "3", Mr. Waxberg, would you state what that part of a circle is?

A. Well, that is a rim from an old model car. It is a clincher tire rim, is what it is.

Q. Now, I believe you stated in response to my previous question, that this dark area in here was all filled in? A. That is all filled.

Q. Now, what is the next strata, Mr. —?

A. Well, that is more or less a sedimentary deposit, I would say.

Mr. Johnson: Well, if the Court please, it

(Testimony of A. E. Waxberg.)

seems to me this picture should speak for itself. This witness is not qualified as an expert on geology.

The Court: Objection overruled.

A. I would say it is almost all sedimentary fill. However, [180] there is good sized rocks in there that anyone would definitely know couldn't have been floated in there, and in along with this sedimentary fill, why, we also found boards and logs and pieces of tin and what have you.

Mr. Taylor: If the Court please, I would like, at this time, to excuse Mr. Waxberg and call Mr. Ragle. Mr. Ragle is the head of the Geology Department—and of the privilege of recalling Mr. Waxberg.

The Court: Yes.

(Whereupon, Mr. A. E. Waxberg was temporarily excused as a witness and left the witness stand.)

RICHARD RAGLE

called as a witness on behalf of the Defendants, was duly sworn and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Richard Ragle.

Q. And where do you reside, Mr. Ragle?

A. 910 Cowles, Fairbanks.

Q. And what is your occupation?

A. Professor of Geology at the University of Alaska.

(Testimony of Richard Ragle.)

Q. And are you a graduate of a recognized Geology school? A. I am.

Q. And where did you graduate from? [181]

A. Colorado College.

Q. Which? A. Colorado.

Q. And have you followed that occupation since your graduation?

A. For approximately two-thirds of the time.

Q. When did you graduate from Colorado University?

A. First in 1933, and received an advanced degree in 1937.

Q. And what does the practical application of geology do? What is its functions—the function of geology?

A. I am afraid your question is too broad to be answered in anything less than a . . . (interrupted).

Mr. Johnson: If the Court please, I think we would have to go out and attend one of his classes to get the answer to that question, wouldn't we?

Q. Well, perhaps I could ask for—a more or less leading question to get that out. Is one of the purposes of geology to determine the formation of land and rock structures?

A. That would be correct.

Q. And are you acquainted with Mr. Waxberg and Mr. Birkliid?

A. I believe I met Mr. Waxberg for the first time, today. I had met Mr. Birkliid prior to the war.

Q. Do you know where Mr. Waxberg's carpenter shop is?

(Testimony of Richard Ragle.)

A. It has been pointed out to me; yes.

Q. And have you ever been down there to that shop?

A. I have never been to the shop; no. I have been in that [182] vicinity, though.

Q. And about what was your purpose in going to that vicinity, Mr. Ragle?

A. To investigate the origin of the strip of land lying between Wendell Avenue and the Chena River.

Q. And what investigations, if any, did you make?

A. The examination of the physical structure of the land, itself; of the character of the slope; of the pattern of erosion and depth situation of the river, and the examination of the age of certain trees at various points throughout the area, to determine time factors.

Q. And on the ground immediately surrounding the Waxberg and Birklid shop what investigation, if any, did you make on that ground, Mr. Ragle?

A. Examination of the character of the land underneath the building now occupied by the Economy Store. An examination of the nature of the land directly adjacent to the present channel of the Chena, and of certain test pits in the ground to determine what the nature of the ground lying between the river and the Economy Store must have been.

Q. And what was the type of investigation carried out, Mr. Ragle? Just what did you do to determine the character of that ground?

(Testimony of Richard Ragle.)

A. The ground directly—for the ground directly included in this case, referring particularly to that ground surrounding [183] the Waxberg-Birkliid building, to examine two holes that had been sunk, apparently as test pits. To determine the nature of that particular soil. I examined the river bank to determine the position of the actual river, itself, and the nature of ground lying on top of the river slope.

Q. And did you make any excavation—any diggings? A. I did not.

Q. Did you have any made?

A. There were test pits already available for examination.

Q. And as a result of that examination, Mr. Ragle, would you state your findings—your opinion as to the formation of that land lying between the building housing the Economy Store, and the river?

Mr. Johnson: If the Court please, we object now to any further testimony on the ground it is incompetent, irrelevant and immaterial. No proper foundation has been laid, and also that it is not within the issues joined by the pleading.

The Court: I think it is within the issues. I don't think, though, he has definitely shown what he found in these holes which I think should be shown before he expresses his opinion, and also, I think it should be shown definitely just where these holes are, how deep they were, what size, and so forth. I don't think the foundation has been laid, yet, for the opinion.

(Testimony of Richard Ragle.)

Q. Where, in relation to the Waxberg and Birkklid shop, were these holes? [184]

A. One hole was directly to the South of the Southwest corner of the Waxberg-Birkklid building, approximately ten feet from the end of the building. Possibly 6 feet East of the West end of the building, and ten feet South of that same end. The hole was between three and four feet deep, diameter of approximately 2 feet. It is made up of—the material surrounding that hole was made up of a mixture of waste articles such as cut and rusted tin cans, pieces of earth, remnants of pieces of box wood, all mixed together without orientation with soil—dirt. The second hole I examined was a little farther South and possibly not on the Waxberg-Birkklid property, and consisted of—well I am not just sure where the property line lies in that vicinity.

Q. How far would that hole be from the Waxberg and Birkklid building?

A. Probably twenty feet from the Southwest corner in a Southwesterly direction.

The Court: Twenty feet from the corner and how far from the back of the building—that is, the South end of the building?

A. I didn't measure it, but I would estimate from ten to twelve feet. This was a . . . (interrupted).

Q. How deep was that hole?

A. A trench not more than two feet deep and the composition of the soil was as I have described

(Testimony of Richard Ragle.)

for the other hole. Not [185] systematically arranged; a conglomeration of tin cans, fragments of industrial waste, and unstratified soil.

Q. What would you say as to whether or not that was an accretion of sedimentary material?

Mr. Johnson: Well, we object to that, if the Court please, as calling for a conclusion and no proper foundation has been laid; incompetent, irrelevant and immaterial at this time.

The Court: Objection overruled.

A. The material had not been transported to its present site by any natural agency. It had not suffered any differential flotation due to transportation by running water, and there was not stratification; fragments of wood that were present below the surface indicated that water was not present at the time this material was deposited.

Q. And did that opinion apply to the material found in both holes, Mr. Ragle?

A. That is correct.

Q. Now, did you make any investigation near the river bank? A. I did.

Q. And what was the nature of that investigation, Mr. Ragle?

A. Examination of the erosion line at normal high water level for the Chena River showed the presence of two very differing strata of recent soil.

Q. And did you, from your examination—from your—of that particular area, what would you say as to the Chena River [186] changing its bed or moving towards the North?

(Testimony of Richard Ragle.)

A. It would be difficult to establish any movement at that particular place, as the evidence indicates the bank has been very stable at that point for quite a long time. Within the recent geologic past, however, the bank undoubtedly has migrated from South to North.

Q. What would you say as to vegetation on that particular area—piece of land, Mr. Ragle?

A. There was no vegetation that I noticed, other than grass to the West of the extension of Lacey Street.

Q. And were there any trees at the bank of the river?

A. At the bank of the river directly opposite the end of Lacey Street there is a clump of alder trees.

Q. And how big were those trees, Mr. Ragle?

A. They varied in height from high shrubs to approximately 12 feet in height.

Q. Now, I hand you an object. Would you state what that is, Mr. Ragle?

A. This is an exhibit of a cross section of a small alder tree and several cores taken from a series of other trees in the vicinity. Do you want me to identify the position?

Q. I think just the large one.

A. This is a section from an alder tree removed from the clump of trees at the bank of the Chena River opposite the extension of Lacey Street. [187]

(Testimony of Richard Ragle.)

Mr. Johnson: Opposite the extension of Lacey Street, did you say?

A. Lacey Street to the river; yes.

The Court: You mean if the street were extended, it would be in the middle of the street?

A. That is correct.

Q. How far from the water line was that clump of trees, Mr. Ragle?

A. The clump of trees was growing . . . (interrupted).

Mr. Johnson: If the Court please, we are going to object to any further testimony along this line for the reason it is incompetent, irrelevant and immaterial. It is not shown to be on the property in question.

The Court: I believe you are correct. It would be on Lacey Street and not on the property.

Mr. Johnson: I believe the witness said this clump of trees would be on an extension of Lacey Street.

The Court: Objection sustained.

Q. I am going to ask one more question. How far was that from the line—from the Lacey Street line?

Mr. Johnson: Well, we object to that, if the Court please, being incompetent, irrelevant and immaterial. And not within the issues and not part of the property in question.

The Court: Well, I will permit the question and see if it is relevant. [188]

(Testimony of Richard Ragle.)

A. The distance from the Lacey Street line wasn't measured. The extension of the street to the river would require the removal of this clump of trees, unless the street were caused to veer from one side or the other.

Q. It would be in Lacey Street, then?

A. That is my opinion.

Q. And adjoining the property of Mr. Birklid and Waxberg, is that right?

A. That is correct.

The Court: Just a minute, I didn't quite understand that. Read that question and answer, please.

(Whereupon, the Court Reporter read the question and answer.)

Mr. Johnson: If the Court please, I think that question and answer be should be stricken out of on the ground it is not competent, relevant or material. It shows that this clump of trees he has testified to is definitely off the property in question here.

The Court: He has it now where it is adjoining it, and not on it. I think you should definitely fix where those trees . . . (interrupted).

Mr. Johnson: He just testified, your Honor, Lacey Street, in his opinion, if extended, that clump of trees would have to be taken out, or Lacey Street would have to veer one way or another, isn't that correct? [189]

A. That is correct.

The Court: In other words, it would be right

(Testimony of Richard Ragle.)

in the middle of Lacey Street, if Lacey Street were extended? A. That is correct.

The Court: All right, I will sustain the objection, Mr. Johnson.

Q. Mr. Ragle, in making a cross section of that tree and arriving at its age, I had you testify as to how long the present back of the Chena River has been where it is . . . (interrupted).

Mr. Johnson: We object to that, if the Court please; incompetent, irrelevant and immaterial. No proper foundation laid and not within the issues.

Mr. Taylor: If the Court please, I believe this is the gist of the whole thing. They are trying to say this bank moved over to the North in a few years.

The Court: How far were these trees from First Avenue?

A. That distance hasn't been surveyed, your Honor. I couldn't testify exactly how far it is.

Examination by the Court

By Judge Pratt:

Q. Can you estimate it?

A. I could refer it to the present river bank of the Chena.

Q. All right, how far from the present river bank? [190]

A. These are on the portion of material resting on the erosion area of the present channel of the river, and from the high water line at the time of the taking of the sample, about twelve feet.

(Testimony of Richard Ragle.)

Q. These trees were twelve feet from the high water mark of the river?

A. No, from the water mark at the time—from the actual edge of the water at the time that happened.

Q. What time of year did you take that?

A. This was in October.

Q. Low water then?

A. Some ice on the bank. It was impossible to determine exactly where the water level was at that time.

The Court: I will sustain the objection to it.

Direct Examination (Continued)

By Mr. Taylor:

Q. Now, Mr. Ragle, from your examination,—no, pardon me; just withdraw that question. Mr. Ragle, I hand you Defendants' Exhibit "A", and ask you if that is similar to the appearance of the hole—the two holes that you examined when you were at the Waxberg place?

A. The arrangement of the materials is similar; yes.

Q. Could you state from the photograph what the various strata is that is laying here?

A. It would be difficult to identify it positively from [191] the photographs what the strata were.

Q. And I hand you Defendants' Exhibit "B", Mr. Ragle, and ask if that is similar to the material that you found in the holes that you examined?

A. Very similar.

(Testimony of Richard Ragle.)

Q. Now, from your examination of that land in question, of the holes and upon exhibits "A" and "B" of the Defendants', would you state whether or not that ground occupied by Birklid and Waxberg, which extends from the back of the Nordale building to the Chena River, is a natural fill or is an artificial fill?

Mr. Johnson: Well, we object to this, if the Court please, calling for a conclusion, the proper foundation for which hasn't been laid. Incompetent, irrelevant and immaterial.

Mr. Taylor: Expert opinion, your Honor.

The Court: Well, objection overruled.

A. I would state, in my opinion, that there is an artificial bearing in thickness from two to eight feet, resting between the river bank and the back of the buildings that front on First Street. That the materials present in their present arrangements could not have been deposited by a natural agency.

Mr. Taylor: You may take the witness.

The Court: Just a minute.

Examination by the Court

By Judge Pratt:

Q. The two holes that you examined, which were South of the Birklid building, is that right?

A. That is right, sir.

Q. That is, they were in between the Waxberg and Birklid building and the other building—the old building? A. That is correct.

(Testimony of Richard Ragle.)

Q. Then, what other hole was there that you examined?

A. The whole front of the river bank.

Q. The whole front?

A. The front of the river bank from just East of the Riverview Hotel.

Q. Fairview?

A. Fairview Hotel, where the erosion fence is built, along the bank of the river. From that point over to the boundaries of the ball park.

Q. Did you—You didn't examine any more holes on the property in question here, did you?

A. No sir.

Q. You are just making your judgment from the river bank, itself?

A. From the erosion cuts.

Q. And these two holes in between the buildings?

A. That is correct.

The Court: That is all. [193]

Cross-Examination

By Mr. Johnson:

Q. Mr. Ragle, you said that these two holes, which you examined—that you say now were South of the Waxberg and Birkliid building, had been dug by someone else, had they?

A. That is right.

Q. Do you know when they had been dug?

A. I have no personal knowledge of when they were dug.

Q. The first time you saw them, they had already been dug, is that correct?

A. That is correct.

(Testimony of Richard Ragle.)

Q. And you have no knowledge of who dug them, or when they had been dug, is that correct?

A. That is correct.

Q. And you say these holes were about two feet deep?

A. As nearly as I can remember it at the present time.

Q. It is your best recollection that they were not any deeper than that, from the surface?

A. Very little, if any, deeper.

Q. Now, I believe you made the statement that, in your opinion, the river—the Chena River at this particular point, had migrated from South to the North within the immediate geologic past. That expression is slightly beyond me. I mean, would you mind explaining what you mean by the “immediate geologic past”? [194]

A. Perhaps I can clarify that statement. The geologic period classified as recent includes a period of time since the end of the Tertiary period approximately forty million years ago.

Q. Then you think that this river has migrated—how far would you say it has migrated within the past forty million years, from the North to the South, or from the South to the North, rather?

Mr. Taylor: Just a moment. Did you say forty years?

Mr. Johnson: Forty million years is what he said the glacial period was. I am trying to find out.

Q. Do you have any idea how far this migration has been during this period?

(Testimony of Richard Ragle.)

A. It wouldn't be possible to discuss it within those terms. The definite geologic recent period includes a very long period of actual years; more than encompasses the entire life of the Chena River.

Q. Well, I am trying to find out, or trying to get the idea in language that I can understand as a layman. Now, the testimony previously has been that the channel of the Chena River at this point has moved from the North—or, rather, from the South to the North within the past 40 years, and the varying distances, but would you say that, knowing the rivers of Alaska, I assume, as a geologist you have studied the rivers of Alaska and know their natural habits and tendencies? [195] A. Definitely.

Q. And they build up sand bars or tear down sand bars and move their banks quite extensively over a period of time, but it wouldn't take forty million years, would it, to move the Chena River from a distance of fifty or sixty feet, the channel; do you think that that could happen within a period of forty years?

A. Your question is geologically difficult to answer because it encompasses a big period of time. If you will permit me to state it in my own words, perhaps I can answer the question to your own satisfaction?

Q. I hope you will do that. I am not trying to tell you what to say.

A. The period of time involved in the development of the present Chena channel has suffered from

(Testimony of Richard Ragle.)

the Tanana River Valley, if you understand me, is probably about ten thousand years. And during the recent portions of that time, the Chena has been in the process of establishing a channel which has, in general, tended to migrate from South to North, but within certain portions of the river a different direction has been temporarily maintained. In this particular portion the average movement of the structure of water between the bend of the river that erodes into the bank in Graehl and again just in front of the N. C. Company, has [196] been, as a whole, from Southeast toward Northwest, and the greatest movement has been fairly accurately estimated on the basis of dendrochronology, is the name of it.

Q. Just what do you mean by that?

A. The rate of the movement of the river has been estimated on the basis of the length of life of the trees now growing on the river banks.

Q. Well, you found no trees on the river bank involving the property in question?

A. Not in that particular piece of property, but on other portions of the river channel; yes.

Q. Now, will you look at Plaintiffs' Exhibit "H" and Plaintiffs' Exhibit "I"? Plaintiffs' Exhibit "H" is a photograph of the waterfront taken in 1905. And Plaintiffs' Exhibit "I", is a photograph of the same waterfront taken ten years later, in 1915. Can you notice any difference in the left bank of the Chena River, as shown by those two

(Testimony of Richard Ragle.)

pictures? By the left bank, I mean downstream. That would be the South bank of the Chena River. Is there any indication to you from an examination of those pictures that there has been a movement of the channel from South to North, leaving exposed on the South a bank or . . . (interrupted).

Mr. Taylor: Just a moment, I object to the question until called to the witness's attention that one of those pictures was taken in October, and one in June in very different [197] stages of the water.

Mr. Johnson: The one taken in—I don't know which one was taken in June.

A. Your Honor, I don't have any—I don't find any land marks that will permit me to assume that this represents the same portion of the river. These two photographs.

Q. Well, I can show you two land marks that are identical. You see this "X" right there (indicating)? The coincides with this "X" that is marked on this photogrpah (indicating). This is what is now known as the Nordale building—this building here (indicating), and that—this—if I recall, that is the "X" which marked the saw mill that formerly stood on what is now known as the Nordale property, and where this building is now located. You see that "X" there (indicating)? That is the present Nordale building, and this saw mill stood on that same lot. Here is the slip of the saw mill. This structure that goes down toward the water, known as the slip, up which they dragged the

(Testimony of Richard Ragle.)

logs into the mill. That corresponds to this area of the river.

A. Would counsel repeat his question?

Q. Well, from the examination of those two pictures, or a comparison of the same location on each picture, can you tell whether or not the channel of the Chena River has, during the space of the ten years intervening between those pictures, migrated from the South to the North, leaving exposed [198] on the South bank, dry land or a bank which previously wasn't there?

A. I would have to state that approximately equal amounts of dry land are exposed in the picture of October, 1915, on each side of the stream channel that are covered in the picture of June, 1905. That gravel bar is exposed on the North side and a mud slope on the South side. There doesn't appear to be any identifiable indication of the movement of the river channel, itself, merely a change in the water level.

Mr. Johnson: That is all.

Redirect Examination

By Mr. Taylor:

Q. Mr. Ragle, calling your attention to the picture of October, 1915, and to the building marked down here with an "X", which has been identified as the Nordale building, lying just South of the Waxberg and Birklid building, would you state from your examination of that ground down there that the river could have possibly deposited sedimen-

(Testimony of Richard Ragle.)

tary matter from 1915 to have built that up to the height that the land is at the present time?

A. I am afraid that I couldn't answer that question directly, because there is no basis for giving the answer. Under normal circumstances it would seem rather unlikely.

Q. Now, Mr. Ragle, would the vegetation along a river bank give [199] you any definite indication as to how long that bank had been there?

Mr. Johnson: If the Court please, we object to that as being incompetent, irrelevant and immaterial. Not within the issues.

The Court: He seemed to find the bank significant in relation to the facts in this case.

Q. Mr. Ragle, would the bank of the river twenty feet from the side line of the property upon which Mr. Birklid and Waxberg have their building be indicative of the conditions that prevail on the river bank of their property?

A. Certain indications that would be present on the river bank would be indicative of conditions adjacent to that point.

Q. And would vegetation that would be twenty or thirty feet away from the side line give you just a clear idea as to conditions that prevails upon their ground?

A. It would establish certain factors; yes.

Clerk of Court: This is Defendants' Identification Number "4"—"D".

Mr. Taylor: If the Court please, I would like

(Testimony of Richard Ragle.)

to offer this in evidence. The large piece, which I think he has laid a foundation for.

Mr. Johnson: We object, if the Court please, on the grounds it is incompetent, irrelevant and immaterial. No proper [200] foundation and not within the issues joined by the pleadings.

The Court: What is the purpose? What are you expecting to prove?

Mr. Taylor: He testified that the vegetation—trees on the bank of the river near to the bank of the property in question, is an indication of a general condition around there which would establish the terrain of the land in question as to how long that bank had been there.

The Court: What do you expect to prove with that tree, there?

Mr. Taylor: I expect to prove that by Mr.—

The Court: What age would you expect to prove that tree had?

Mr. Taylor: Twenty years. Twenty—thirty years.

The Court: You are supposed to take what your witness would testify to. Have you talked to him?

Q. Mr. Ragle, have you been able to establish the age of this tree?

A. I had better report to you that I submitted a report that contained my findings as to the age of that tree.

The Court: You submitted a report?

A. To Mr. Taylor.

(Testimony of Richard Ragle.)

The Court: You got an opinion on it from somebody, did you?

A. No, I counted the years of growth indicated by the annual [201] rings of the tree, myself.

Q. And you made that report in that finding, Mr. Ragle? A. Yes, sir, I did.

The Court: And who did you make the report to?

A. To Mr. Taylor.

Q. Do you have a copy of that report with you, Mr. Ragle?

A. I don't have a copy with me; no.

Mr. Johnson: If the Court please, I still don't see what all this has to do with the issues.

The Court: I think it all depends on the tree, whether it has any relevancy or not. And then, there is a question, again, to the court, of the river; that might not have been the course of the river, and as it came south.

Q. I hand you a report that you prepared, Mr. Ragle. Is that the report that you prepared, Mr. Ragle? A. That is correct.

Q. And does that contain your findings of the conditions surrounding the property that is in issue here? A. That is correct.

Q. And does that report state the age of this—Plaintiffs'—or, Defendants' Identification "4"?

A. It does.

Q. What is the age as shown on your report as to that identification?

(Testimony of Richard Ragle.)

A. The report states that the sapling shows an age of not [202] less than twelve years.

The Court: When did you take your sample?

A. Last Fall.

The Court: Last Fall?

A. October.

The Court: October of '48?

A. That is correct.

Mr. Taylor: I would like to offer that in evidence, your Honor.

The Court: I will permit it. It may be admitted.

Clerk of Court: Defendants' Exhibit Number "4."

(Defendants' Identification "D" admitted in evidence as Defendants' Exhibit "4.")

Mr. Taylor: I believe that is all, unless Mr. Johnson has any.

Recross-Examination

By Mr. Johnson:

Q. Mr. Ragle, one question. This sapling you have just testified to, you say you found that back twenty feet from the water line—some such a matter?

A. It is growing directly on the little cut bank on the edge of the present channel. Now, the water line at that particular time wasn't determinable because the water had already begun to freeze and there was ice out several feet from the bank. [203]

Q. Well, how far away from the Nordale water-line would you say it was?

(Testimony of Richard Ragle.)

A. From the mean high water line almost directly above the water. From the lowest water of last Fall, approximately twelve feet.

Mr. Johnson: All right, that is all.

Mr. Taylor: That is all.

(Whereupon, Mr. Richard Ragle was excused as a witness and left the witness stand.)

Mr. Taylor: If the Court please, I would like to excuse Mr. Ragle as he is very busy at the University, unless Mr. Johnson wants him held?

The Court: Very well, he may be excused. Recess until 2:00 o'clock.

(Whereupon, at 12:10 o'clock p.m., Court was recessed until 2:00 o'clock p.m.)

Be It Remembered, that at 2:00 o'clock p.m., the second day of trial of the above-entitled cause was continued, the parties above mentioned again appearing in court in person and by their attorneys of record; the Honorable Harry E. Pratt, District Judge, presiding;

And Thereupon, the following proceedings were had:

The Court: Counsel ready to proceed?

Mr. Taylor: Yes, your Honor. [204]

Mr. Johnson: We are ready, your Honor.

Mr. Taylor: We will call Mr. Waxberg.

A. E. WAXBERG

one of the Defendants, having previously been duly sworn as a witness in his own behalf and temporarily excused for the testimony of Mr. Ragle, was recalled to further testify on direct examination, as follows:

Direct Examination
(Continued)

By Mr. Taylor:

Q. Mr. Waxberg, at the time that you started to build your building on the land that is in controversy here, did you run across any drains in the ground there, or on top of the ground?

A. No, not near the building. There is one out on, I would say, ten feet out into the street, according to sighting down Lacey Street.

Q. Was that a supposed drain?

A. Well, the one end; yes. It was buried into the ground. Only the outlet was exposed.

Q. And was there water coming out of it?

A. Occasionally there was; yes, sir.

Q. Now, what, if anything, did you do with that drain?

A. I extended that drain clean on out to where it would drain into the river, because we wanted to put in a little fill in there so we could drive our car up to the building. [205]

Q. How big a drain was it?

A. Made out of two by ten and two by twelve.

Q. And how much of an extension did you put onto the drain? A. About eighty feet.

(Testimony of A. E. Waxberg.)

Q. Did anybody connected with the City say anything to you about that drain, either——

Mr. Johnson: We object to that, if the Court please; incompetent, irrelevant and immaterial. Purely hearsay.

The Court: Objection sustained.

Q. I believe Mr. Wehner testified yesterday about this drain.

The Court: It is immaterial. I will sustain the objection.

Q. Now, do you know Mr. Wehner?

A. Yes, I do.

Q. And how long have you known him?

A. Oh, I have known him ever since I have been in town—twelve, thirteen years. It will be thirteen years in July.

Q. And what is the nature of that acquaintance?

A. Well, he is always interested in building and one thing and another and that is the line of work I have followed, and I have got acquainted with him over at the N. C., when I was putting up the N. C. Caterpillar building, and from time to time when we were working down at the Lathrop building he used to come down and talk about this, that and the other thing. [206]

Q. And did he talk to you about the drain on Lacey Street? A. Yes, he did.

Q. And when was that?

Mr. Johnson: Well, if the Court please, we object to this; being incompetent, irrelevant and immaterial. Not being connected with the issues.

(Testimony of A. E. Waxberg.)

The Court: Objection sustained.

Q. Now, calling your attention to Plaintiff's Exhibit "L," at the time that that picture was taken, Mr. Waxberg, how much water did you have in your building?

A. Well, it looks like it was just about level with the floor. However, it is hard to decide right now from this picture. We had 16 inches of water over the entire floor in our shop.

Q. And at that time was any other buildings in that vicinity down there flooded and under water?

A. Well, the building belonging to the Army down there was.

Q. And farther to the East did you notice any of the buildings down Noble Street?

A. Yes, there was water all the way up Wendell Avenue.

Q. Now, how long did the water remain standing in your building before it receded?

A. I would say about a week.

Q. And after it had receded from there, how much sediment was [207] left on the floors?

A. Well, I didn't measure it, but it couldn't have been much. It couldn't have been a quarter of an inch, even, because we swept the floor and scrubbed it off.

Q. All right. Now, calling your attention to Plaintiffs' Exhibit "M," which represents certain mud, is there any indication of that sediment on the land at the present time?

(Testimony of A. E. Waxberg.)

A. No, there isn't.

Q. After it dried what became of it?

A. Well, it washes down into the ground, I imagine, from the rains and it just disappears.

Mr. Johnson: Well, if the Court please, we object to what he imagines and move to strike that answer as immaterial.

The Court: It may be stricken.

Q. Where did it go? Where did that sediment go?

A. Well, it just disappeared. Where it went to I don't know. It is not evident now.

Q. And did that raise the level of the land at all, Mr. Waxberg?

A. No, it didn't.

Q. And I believe—did you make any inspection of that particular place yesterday, in regard to it?

A. Well, we have been crawling underneath the building off and on and—not yesterday, I 'didn't. but I have been under there several times. We store things in there and the skids are still under the building that were there when we moved [208] the building over, and there is no deposit of any amount on the skids now.

Q. Do you remember going through, down to this place yesterday with me?

A. Yes.

Q. And looking at this particular part back here where the grass was,

A. Well, yes.

Q. And was there anything showing whatsoever of this sediment in that?

A. No, there wasn't. It was all covered with

(Testimony of A. E. Waxberg.)

grass. In fact, we had to rake it some to—there is lots of fellows coming around there smoking cigarettes and there is a lot of grass in there (interrupted).

Mr. Johnson: Well, if the Court please, I don't see that that has any relevancy and we move to strike it. Not responsive to the question.

The Court: Well, it may be stricken.

Q. Was the grass hidden by this sediment?

A. No.

Q. That is the reason you had to rake it so it wouldn't—

A. That is right. It might catch fire.

Q. Now, Mr. Waxberg, since you have been down there what—has there been any dumping of refuse or garbage down at that part of town? [209]

A. Yes, there has.

Q. Whereabouts?

A. All along the bank from the Fairview on up and even at the end of Lacey Street there has been dumping.

Q. Who did that dumping?

A. Well, I don't know. The only one I noticed here the other day, Mr. Wehner has been cleaning the streets and he dumped the dirt at the end of Lacey down below our shop. It is still evident.

Q. Was that rubbish dumped on the ice, Mr. Waxberg?

A. Well, it was dumped on the bank and some of it goes onto the ice and some of it doesn't.

(Testimony of A. E. Waxberg.)

Q. Did you ever go over to the place that is called the Children's Playfield, and see any sawdust there? A. No, I haven't.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Johnson:

Q. Mr. Waxberg, you say you have lived in Alaska about thirteen years, is that right?

A. It will be thirteen years in June; yes.

Q. Has that all been in Fairbanks?

A. Yes.

Q. Now, I believe this morning in response to a question from Mr. Taylor you said that you had had no trouble in moving [210] this building of yours over onto this property that you now occupy. Isn't it a fact that before you moved the building you received a letter from me cautioning you against moving that building?

Mr. Taylor: If the Court please, we object to the question; improper cross-examination. Our question along the same line was objected to and sustained.

The Court: Objection sustained.

Mr. Johnson: If the Court please, they have admitted that in their pleading, anyway, as far as that goes. Because they have admitted the allegations of Paragraph III of the Complaint—or rather, Paragraph IV of the Complaint, which alleges that—Paragraph IV alleges that the Plain-

(Testimony of A. E. Waxberg.)

tiffs have demanded of the Defendants the possession of said premises so unlawfully entered upon by the Defendants and served notice upon the Defendants not to trespass, but notwithstanding this, the Defendants refused, etc. The allegations of that Paragraph, your Honor, are admitted.

The Court: Then they aren't at issue. There is no issue there at all.

Mr. Johnson: Very well. I just thought, however, he had been asked the question this morning as to whether or not he had had any trouble and he said "no."

Q. Now, Mr. Waxberg, you testified about a hole that you dug in front—I think you said this was dug in front of your [211] building? A. Yes.

Q. Now, will you look (interrupted).

The Court: Will you bring out—where is "front"?

Q. I mean by "front," the east side of your building, facing Lacey Street? A. Yes.

Q. That is what I meant by the "front." Is that what you mean?

A. That is what I mean; yes.

Q. The east side of the building is where you dug this hole for the oil tank, isn't it?

A. That is right.

Q. Now, will you look at Plaintiffs' Exhibit "G." That shows the east side of your building, doesn't it, facing Lacey Street?

A. That is right.

(Testimony of A. E. Waxberg.)

Q. Will you indicate—can you tell on that Exhibit about where you dug this hole?

A. Well, it is right under this window (indicating), alongside the door. It is right where these saw horses stand, maybe a little further back, because they were quite a distance from the building.

Q. Would that be under the window to the right of the door, going into the building?

A. To the right of the door going into the building. [212]

Q. As shown on this Exhibit?

A. That is right.

Q. Exhibit "G." Now, do you know how far it is from the front of your building—that is the front, the east side of your building—how far it is from there to the west edge of Lacey Street? In other words, how far back from the west edge of Lacey Street does your building set?

A. Well, as near as I can—I never did measure it or have it surveyed, but just from general observations, sighting down through, according to the Lathrop building, which is in line with the Lacey Street, I would say it would be eight or nine feet.

Q. The Plaintiffs' Exhibit—oh, this is "J." I made a mistake. This is "G." The picture is "J." Plaintiffs' Exhibit "G," which has been introduced in evidence, shows your building about six or seven feet from the edge of the street, according to this scale of one inch to fifty feet. It is about 5/16 between the two, I think. That would be six or seven feet, is it not?

(Testimony of A. E. Waxberg.)

A. I would say that location would be rather rough; also, because it would be hard to tell on a— from my experience—on a map of an inch to fifty feet.

Mr. Taylor: However, I object to it upon cross-examination upon the grounds that the plat would speak for itself, and the Plaintiff failed to put in any proof as to the distances [213] whether the map was drawn to scale, or not.

Mr. Johnson: Oh, yes, the Court asked that question to the witness Linck, and the witness testified it was drawn to scale.

The Court: Objection overruled.

Q. Now, you say that this hole which you dug was about four feet wide and I think you said six feet long?

A. Six or seven feet long, yes. Enough to bury a fifty-gallon drum.

Q. And about five or six feet deep, is that right?

A. Well, it is all of six feet deep.

Q. Now, how does that run—does it run parallel with the building? That is, the length?

A. Parallel with the building; yes, sir.

Q. And how far away from the building?

A. It is right up against the building.

Q. And I take it when you dug out this hole, which is, as you say, four and a half feet wide and six feet long and six feet deep, you piled all the dirt to one side, was that it?

A. Not all of it; no. You couldn't put it all in

(Testimony of A. E. Waxberg.)

one place. You flowed it on both sides and in front of the hole.

Q. But all of this accumulation was on the one spot, is that it? That shows all of the accumulation that came out of the hole? [214]

A. No, this is just the way it is thrown up there. If you will note, the tire rim shown in the hole is not shown in that photograph.

Q. I understood you to say——

A. That is some of it.

Q. This is a pile of dirt that was thrown out of the hole?

A. That is just the way it was thrown out of the hole. However, it isn't all there.

Q. You don't have any other pictures?

A. There is a picture there showing the tire rim. It wasn't dug up.

Q. You don't know anything about the action of the Chena River with reference to the channel migrating from south to north, do you? In other words, you haven't been here, only 13 years?

A. No, sir, it has been the same the last 13 years, at least, since I have been here, because they always have a road across there from time to time.

Q. And that hasn't changed noticeably since you first came here, has it? A. No.

Q. Now, you say that you recently examined the ground around your building, as shown by Plaintiffs' Exhibit "M." You say that you recently examined the ground around that portion of your

(Testimony of A. E. Waxberg.)

building and found no evidence of sediment, is that right?

A. Not in this particular spot, because if I remember right, this ground is filled in now because we hauled—we hauled about three or four hundred yards of gravel in there and filled along this platform, but anything back of the building and underneath the building——

Q. Well, that is—that abutment, or this post, here, is the southwest corner of your building?

A. Southwest corner?

Q. Yes. According to the testimony of the photographer who took the picture. Have you looked at that? You say you looked around that area recently?

A. Well, sure, I have been around there.

Q. And you saw nothing but grass?

A. Not around this particular spot, because there, if I remember right, there is ice and snow underneath the building yet.

Q. That is what I am getting at. Since that picture has been taken the ground has been covered with a considerable amount of snow all during the winter, has it not? You said just recently you examined the ground and (interrupted).

A. (Interposing): Underneath the building, yes, I have. But this particular corner I haven't looked at that; no. Right behind the building the grass is growing there and it is clear. [216]

Q. Now, I believe you said that after the flood

(Testimony of A. E. Waxberg.)

water receded, you had about 16 inches of water in your building, is that right?

A. That is right.

Q. And that seeped in, I suppose, through the cracks around the building. In other words, you didn't let it in?

A. Oh, we had to let it in. We had to work there all the time to save our material. We had the waters open—the doors open letting the water through and when the water quit raising we closed the doors. We had the doors closed.

Q. And it lowered—when it began to go down, it lowered 16 inches in your building before it came to the floor?

A. That is right.

Q. And in that 16 inches it deposited, I believe you said, a quarter of an inch?

A. I didn't measure it. We swept it out with a broom. I don't know whether you can sweep a quarter of an inch of dirt with a broom or not. It is just a guess, more or less.

Mr. Johnson: That is all.

Mr. Taylor: That is all.

(Whereupon, Mr. A. E. Waxberg was excused as a witness and left the witness stand.)

Mr. Taylor: Call Mr. Rothenberg.

RICHARD ROTHENBERG

called as a witness on behalf of the Defendants, was duly sworn and testified [217] as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Richard Rothenberg.

Q. And you have resided in Fairbanks?

A. Yes, sir.

Q. And how long have you resided here, Mr. Rothenberg? A. Since 1903 in Fairbanks.

Q. And has that been continuous?

A. Well, no. No. No. Off and on. You see, some stampedes happened during that time.

Q. But you have made your headquarters here, have you not, most of the time? A. Yes.

Q. Now, calling your attention to the lower end of Lacey Street, Mr. Rothenberg, are you familiar with it, a condition of that part of the town along 1904 and '05?

A. Yes. There was no lower end of Lacey Street. Lacey Street stopped at Front Street.

Q. At where?

A. It stopped at Front Street—the first street—First Avenue.

Q. And there was no way of getting beyond there, then, Mr. [218] Rothenberg? A. No.

Q. Were you here at the time the saw mill was operating on the corner of Lacey and First Avenue?

A. Yes, I worked at the next saw mill to it.

(Testimony of Richard Rothenberg.)

Q. In which direction?

A. The mills—Joe Hanson's mill.

Q. Was that east or west?

A. No, that was above Parker's mill.

Q. Over on what is known now as the Children's Playground? A. Yes.

Q. What did the mill you were working in do with their slabs and sawdust?

A. Well, the slabs they were sold and we sawed shingles out of the slabs and the sawdust, we used a lot of sawdust for fuel and for insulation, but the rest of it was piled up on the bar and rode into the river.

Q. Now, would you kindly give, to the best of your ability, a description of the river along there, and especially in relation to how they got their logs into the mill of Parker's?

A. I didn't quite catch that, sir.

Q. Just describe the conditions in front of there—I guess it would be in front of the mill on the river side?

A. There was a slough. There was a slough between the river and the bank of First Avenue, and there was a big bar [219] where the playfield is now. There was a big gravel bar there.

Q. And where did they bring the logs into?

A. Well, through that slough.

Q. And was that—did that slough run off of the main part of the river, back up there (indicating)?

A. Oh, yes.

(Testimony of Richard Rothenberg.)

Q. And how long did that slough remain there, Mr. Rothenberg?

A. I couldn't say that. I didn't—can't testify to that, sir. I know that has changed considerably there, but I don't know how it has. The change came gradually, you know, and I couldn't specify the time.

Q. Did you notice any—ever notice, at any time, of that slough being filled up?

A. Oh, yes. Yes.

Q. And what was it filled up with?

A. There was evidently an obstruction on the course—of course the sawdust we put in there, and the sawdust of Fred Parker—it caused the obstruction, of course, and whenever the Tanana would get high, it would carry a lot of silt, you know, and of course it kept on filling up.

Q. Did you ever notice some logs losing their bark in there, getting bark, and also help filling that place up? A. Oh, naturally.

Q. And how long did you work in that saw mill, Mr. Rothenberg? [220]

A. I worked there one season. In 1904.

Q. And after you quit working for the saw mill, how often did you go down that part of town, Mr. Rothenberg?

A. It is a hard question to answer.

Q. Just intermittently, was it—maybe no specified time that you might be down there at fairly long intervals apart?

(Testimony of Richard Rothenberg.)

A. Well, from 1912 or 1913, rather, I was here in town. Well, I made it my headquarters and I went down there quite often.

Q. And 1912—that would be 8 years after you quit working in the saw mill? A. Yes.

Q. Now, when you went down in 1912, did you see much of a change in that slough, Mr. Rothenberg?

A. Yes, there was quite a bit of silt on the bars. There wasn't much of a slough left.

Q. Did you, at any time, ever notice any other thing in that slough besides silt? Any refuse of any sort in there?

A. I might, but I couldn't testify to that. You know they dump garbage all over the town, so they might have dumped it in there. I don't know.

Q. You, yourself, never?

A. No, no.

Q. And I will show you a picture here, Mr. Rothenberg. You heard the testimony here, did you, about these—this hole? [221] A. Yes.

Q. That is Defendants' Exhibit "2."

A. Yes, it looks pretty natural, with all this refuse in there.

Q. And I hand you Defendants' Exhibit Number "3," and call your attention to an iron rim down there. Did you ever see anything like that flowing in the Tanana River, Mr. Rothenberg?

A. They are roots, aren't they?

(Testimony of Richard Rothenberg.)

Q. According to the testimony, this is an iron rim of a car. A. No, that wouldn't float.

Q. And you say it was quite a habit of dumping debris and refuse along the river in those days?

A. Yes, sir; yes, sir.

Q. You knew that was a general condition, although you didn't actually see any of it dumped, yourself?

A. No, I never seen anybody—any actual dumping, but there was a lot of people complaining about having their garbage dumped all over, you know.

Mr. Johnson: Well, if the Court please, we object to that answer and move to strike it upon the grounds it is not responsive to the question.

The Court: It may be stricken.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Johnson: [222]

Q. Mr. Rothenberg, you have mentioned a slough which you say was somewhere along the property that is in question here. Will you look at this map, which is Plaintiffs' Exhibit "F." Now, here is the Chena River bank (indicating), and here is Lot 6 in Block 4. This is the lot that is in question here. Now, you say the saw mill—this is where Mr. Parker had his saw mill (indicating). Now, where was your saw mill, the one you worked in, with reference to Parker's mill? A. Just above it.

Q. Was it up here somewhere (indicating)?

A. Just above it.

(Testimony of Richard Rothenberg.)

Q. Up here, on the playfield?

A. Just close to the playfield, just about where the playfield is now.

Q. Well, the playfield is along in here now (indicating), something like that?

A. There were two bars there. There was a bar close here (indicating), and a slough in there, and another bar on the outside.

Q. Now, this slough that you talk about was right in here (indicating)?

A. Just about; yes, sir.

Q. I see. All right, that is all I wanted to know.

The Court: Can't it be marked where he said the slough was? [223]

Q. Will you mark here with a pencil where you say the slough was? You said it was right in here (indicating)?

A. Well, you know, 45 years was a long time ago.

The Court: Will you just describe that instead of marking the official record? Just describe it so I can understand it.

Mr. Johnson: Well, he indicates, your Honor, the Southwesterly portion of Block 3.

A. The mill would have been just about here (indicating), because when I was sawing and planing, I could see the people building their houses on Wendell, you see.

Q. Well, then, the mill was facing Wendell Avenue?

A. No, the mill—the end of the mill with the saw,

(Testimony of Richard Rothenberg.)

it would be facing Front—First Avenue, and——
(interrupted).

Q. Well, here is Wendell Avenue (indicating).

A. Yes, I know. But it would be facing this way,
towards Wendell Avenue.

Q. Let's see, towards the South?

A. Yes, towards the South.

Q. And that was about——

A. Just about, I should judge——(interrupted).

Mr. Taylor: If the Court please, I am going to
object to this cross-examination because the question
directed to the witness were as to the slough back
of Parker's mill.

Mr. Johnson: He is trying to identify it by de-
scription, [224] rather than by marking this map.

A. No, I couldn't swear to that, anyway. It is
too long a time.

Q. But the slough you speak of was right behind
the mill that you were working in? A. Yes.

Q. And that was in a portion of what was then
known as Block 3 of the Town of Fairbanks? This
is Block 3 (indicating). Isn't that right?

A. I don't know. I couldn't say that, sir.

Q. Well, here is Block 3 (indicating)?

A. You see, nothing interested me in this case
at all, and nothing ever did. All I can say is from
memory.

Q. I am just asking for your best recollection,
is all. Mr. Rothenberg, I believe you said that the
change in the Chena River has come gradually, is
that correct? A. Yes.

(Testimony of Richard Rothenberg.)

Q. Now, just what do you mean by "the change"? Do you mean that the channel has moved, or——?

A. Well, any obstruction will gather silt and change the river. In fact, some of the islands will be changed from one place to another, you know, and that might happen in one season, but, as I say, I never was interested in the change of the river down there, you know.

Q. Have you noticed any change in the channel moving from the [225] South to North; that is, moving—the bank cutting down in the Slaterville and Graehl side, and building up on the South side of the river—on the left bank?

A. I notice the current changing—the current changing, but I don't——

Q. Well, how did the current change?

A. Well, I can't explain that, because that is—somebody else will have to explain why the current changed. The current used to be more over towards Graehl, and then on this side. You see, this side sort of made an eddy.

Q. And that eddy filled in gradually, didn't it?

A. Yes sir; yes sir.

Q. And then the channel has moved out from where that eddy used to be?

A. Yes sir; yes sir.

Q. And the bank has—the left bank of the river—Chena River—has been extending outward, or to the North, hasn't it?

A. Yes. That is right.

Mr. Johnson: That is all.

(Testimony of Richard Rothenberg.)

Redirect Examination

By Mr. Taylor:

Q. Mr. Rothenberg, in response to my questions you stated that you remembered the slough that was down in front of Parker's mill?

A. Yes; yes. [226]

Q. And there was also a slough in front of the mill you were working in, too?

A. Yes, it was quite cut up there. There was several bars. The playfield, itself, as I remember, consisted of two bars, or more than two bars, you know.

Q. One on each side? A. Yes; yes.

Q. Did those bars kind of run out into the streamway? A. Yes, came out from above.

Q. And the question, that I propounded to you, referred to the slough in front of Parker's mill, is that right?

A. Yes. Well, it is a continuation of it, you see.

Mr. Taylor: I see. That is all.

Recross-Examination

By Mr. Johnson:

Q. Well, now, Mr. Rothenberg, this slough you say was in front of Parker's mill, was also what you call the eddy, wasn't it? A. Yes.

Q. Where the eddy was?

A. Yes. The eddy was by Parker's. We didn't have it in the upper mill.

Q. But you had the eddy at Parker's, and the eddy was right in the river? A. Yes. [227]

(Testimony of Richard Rothenberg.)

Mr. Johnson: That is all.

Mr. Taylor: That is all.

(Whereupon, Mr. Richard Rothenberg was excused as a witness and left the witness stand.)

Mr. Taylor: I would like to call Mr. Norlin. Albert Norlin.

ALBERT NORLIN

was called as a witness on behalf of the Defendants, and after being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Albert Norlin.

Q. And where do you reside, Mr. Norlin?

A. Fairbanks. 1215-3rd.

Q. And how long have you lived at Fairbanks?

A. I have lived since 1910 in Fairbanks and around the Creeks, you know.

Q. How—what is your occupation, Mr. Norlin?

A. Well, I am a miner.

Q. And are you familiar with the property at the Northwest corner of the intersection of First Avenue and Lacey?

A. Where the saw mill was?

Q. Where the saw mill was? [228]

A. I don't know where the saw mill was. It was before my days.

Q. Do you know Mr. Waxberg?

(Testimony of Albert Norlin.)

A. I know him; yes.

Q. Do you know where his carpenter shop is located?

A. Yes sir.

Q. At the foot of Lacey Street?

A. Yes sir.

Q. Now, did you ever have occasion to go down to that part of the town in the years past?

A. Well, I have been down there. It was a good while.

Q. And when you first went down there did you remember—or do you remember the condition of the slough or the condition of the ground around there?

Mr. Johnson: Well, if the Court please, there is no testimony there was a slough there, yet. I think he should lay the foundation.

Q. What was the condition of the land that is now occupied by Mr. Waxberg?

A. At the time I was there—I was there one time from 1920 to '25 or '30, and there was not much of anything. A few wheels and rubbish and trash and stuff that was thrown on the bank. Kind of a hole, and anybody threw things there.

Q. You mean kind of a hole? [229]

A. There was a hole there right back of Pete Manlove's—Vachon Building in the back end. In the front Vachon had a kind of a fur store. He had his storehouse. In the back he used to keep dogs back there in the back end of the Vachon building, and sometimes he had them up above on

(Testimony of Albert Norlin.)

the floor, and sometimes underneath and sometimes he tied the dogs outside where lots of dog mushers tied the dogs out there.

Q. And this hole that you mentioned about—did that run from the Nordale building back to the river?

A. No, it run from the Lacey Street towards—up—or, downstream.

Q. Downstream. And how deep was that?

A. Oh, I would judge it was six—five, six feet. It was kind of a sag, you know.

Q. And what had that been filled with, Mr. Norlin?

A. Well, it was filled with trash, cans and several cases; I seen a fellow—Kehoe—that fellow sold out to Wehner, he sold his business out to Mr. Wehner—he threw a lot of stuff in there.

Q. Was that used as a kind of a dump down there?

A. I don't think they were supposed to dump there, but they did, just the same.

Q. And during your trips down there, had you seen that condition of debris and refuse down there?

A. Well, I hadn't been there for a long time; I had been around the creeks, but the time I was there they was filling up there all the time.

Q. And when did you go to the creeks, Mr. Norlin?

A. Oh, I went with the F. E. Company about in 1930.

(Testimony of Albert Norlin.)

Q. And about what was the last time you were down there, prior to 1930?

A. You mean down to Birkclids?

Q. Down to Birkclid's?

A. Oh, I have been down there several times. Last Summer I have been down there. I have been down there is last Winter.

Q. No, I mean prior—before you went to work for the F. E. Company, Mr. Norlin? Was you down there quite often just shortly before you went to work for the F. E. Company?

A. No, I was on the creeks. I wasn't down there.

Q. When did you come back to town to remain permanently here?

A. Well, I have been back about four years, now.

Q. And would you come in off and on; stop here in the winter?

A. Off and on. In and out.

Q. And did you ever have an opportunity to observe that ground there where Mr. Waxberg has his shop now?

A. Yes, I have seen it; yes.

Q. And did you see any change in the contour of the land where his shop is, between there and the river? [231]

A. Well, it had filled in some.

Q. It had filled in some more?

A. Umhummm.

Q. And what with?

A. Well, I don't know. It must be silt from

(Testimony of Albert Norlin.)

the river. I don't know whether there was any garbage dumped after that. I don't know that, but while I was there, garbage was dumped. It could be silt from the river—high water.

Q. How many years was it you were there, Mr. Norlin?

A. At the Nordale? I was on the old place on Front Street five years.

Q. And when did you quit there?

A. '25, when the hotel burned. '25. Something like. I worked seven years at the old one.

Q. And during that time you had occasion to observe that particular area quite often?

A. Every day when I worked on Front Street.
Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Johnson:

Q. Mr. Norlin, how long have you been in Alaska? A. Since 1910.

Q. 1910. When did you first observe this property that is occupied by what you call the Vachon Building? Was that when you first went to work in 1920 for the Nordale hotel? [232]

A. Yes, that I paid any attention to it; yes.

Q. That is the first time you noticed it? And the Vachon building was on the property then, and had been for a long time, hadn't it?

A. I don't know how long it was there.

Q. But it was there then?

A. It was there then.

(Testimony of Albert Norlin.)

Q. Now, you mentioned a hole that you say was about six feet deep, right at the back end of the Vachon building? A. Yes.

Q. Was that a kind of a ditch that ran along the back of the building, or was it just a round hole, or what was it?

A. No, no, it was all along there. Kind of all along from Lacey Street, now, and out towards that ball park there, you know. The kind of a drop and they used to drop things in it.

Q. And this hole extended from Lacey Street over towards the ball park, is that right?

A. Yes, and towards downstream.

Q. Well, when you say "downstream," you mean right along the back of the Vachon building?

A. That is right.

Q. About how far? About the width of the building, would you say?

A. Well, half of the Vachon building, because it was some [233] in the back end.

Q. And this hole extended about half of the width of the Vachon building? A. Yes.

Q. Now, you say they used to keep dogs back of the Vachon building when you were over there?

A. Yes sir.

Q. Now, beyond this hole, from the hole to the river, was there quite a bit of land in between there?

A. Yes, there was, somewhat.

Q. And it was high and dry land, was it, except—

(Testimony of Albert Norlin.)

A. Well, it was kind of sloping.

Q. Yes, but I mean it was dry, except when the water was extremely high, isn't that right?

A. Yes.

Q. And most of that land from the hole down to the river, you say, was filled in with silt from the river, is that right?

A. There was a certain amount of silt coming in there in high water, you know.

Mr. Johnson: That is all.

Redirect Examination

By Mr. Taylor:

Q. Mr. Norlin, I believe you said in response to my question that this depression run in the ground which was five or six feet deep, did you tell me that run from the back—from [234] around Lacey Street opposite the back of the Nordale building, down towards the downstream part?

A. Yes.

Q. Then there was another swale run towards the ball park, is that right?

A. Yes, it ran across to the other side.

Q. Did they dump in both of those—the one towards the ball park?

A. I didn't see them dump towards the ball park, but I see them running from Lacey Street towards the Nordale building, coming downstream. There was a hole there they dumped in.

(Testimony of Albert Norlin.)

Q. Where did the Nordale Hotel dump their ashes and debris?

A. Well, I don't know about ashes, but the rest of the stuff from the Nordale Hotel—over the rail.

Q. Into the river?

A. It didn't go into the river, but on the bank and the high water took it out in the Spring.

Mr. Taylor: That is all.

Recross-Examination

By Mr. Johnson:

Q. Where was the Nordale? That was downstream from the Vachon building? A. Yes.

Q. There were one or two buildings between the Vachon building and the Nordale, isn't that right?

A. There was one, anyway.

Q. You didn't throw any refuse on the lot that the Vachon building sits on, did you?

A. No.

Mr. Johnson: That is all.

Mr. Taylor: That is all.

(Whereupon, Mr. Albert Norlin was excused as a witness and left the witness stand.)

Mr. Taylor: I would like to call Mr. Stanford.

Mr. Johnson: May we have a short recess, your Honor?

The Court: Swear him first.

DAVIS STANFORD

called as a witness on behalf of the Defendants, was duly sworn.

Clerk of Court: Court is recessed until ten after 3:00.

(Whereupon, Court was recessed for ten minutes.)

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. My name is Davis Stanford, Mr. Taylor.

Q. And where do you live, Mr. Stanford?

A. I live at 618 5th.

Q. And how long have you lived in Fairbanks?

A. Since 1911. [236]

Q. What is your occupation, Mr. Stanford?

A. I am a caulker by trade.

Q. And what occupation have you followed at Fairbanks?

A. Well, I does that in between; yes sir. A caulker doesn't have anything to do at times, so I works around.

Q. What are you working at now, Mr. Stanford?

A. Well, nothing particular, Mr. Taylor. Just waiting for a job to come up.

Q. Now, what are you doing now, Mr. Stanford?

A. Well, sir, I would do anything at the present time, but I am a caulker. That is what I follow.

Q. Caulking river boats or houses?

A. Yes, sir, anything like that. Houses.

(Testimony of Davis Stanford.)

Q. Have you done anything around Fairbanks?

A. Yes sir, but lawns or anything like that.

Q. Mr. Stanford, do you know where the building on the corner of Lacey Street and First, known as the Nordale building, is? A. On First?

Q. And Lacey?

A. First and Lacey? I know where the Nordale Hotel was.

Q. Well, no. It is a building owned by Mr. Nordale. The Economy Store is in it now.

A. Yes sir. Well, I tell you, sir, I used to. I know it as the Vachon Building, but I didn't know when the Nordale lived down there, and I didn't know anything about the operation [237] of the mills.

Q. It was known as the Vachon building years ago? A. Yes sir, I know that.

Q. Do you know Mr. Waxberg?

A. Oh, yes sir, I do sir.

Q. Do you know where his building is—his work shop? A. I do; yes sir.

Q. Right back of the Vachon building?

A. Yes sir.

Q. Now, were you acquainted with the nature of the ground right back of the Vachon building in prior years?

A. Yes sir, I used to go through there all the time when I worked for Eddy Kehoe, and we used to throw ashes and stuff along that strip there, right where the building was.

(Testimony of Davis Stanford.)

Q. Who is Ed Kehoe?

A. He is dead, now, but he sold out to Wehner.

Q. What was he doing?

A. He was the Scavenger outfit.

Q. When did you go to work for him?

A. I used to do any kind of work around.

Q. What year did you go to work for him?

A. The year before he sold out to Mr. Wehner.

I forgot what year was that. He was here yesterday.

Q. And was the ground from the back of the Vachon building down to the river—was it level?

A. Well, sir, it seemed away beyond the building, but there was quite a hole there—sloped right down to the river.

Q. And would that hole be on the ground immediately back from the Vachon building?

A. Yes sir.

Q. Down to the river?

A. Yes sir, down to the river; yes sir.

Q. And is that where you and Mr. Kehoe used to dump?

A. There; throw some boxes and paper and stuff.

Q. And how often would you dump in there, Mr. Stanford?

A. Oh, perhaps once a month, whenever we got an extra job to do anything like that. We would go down there and take a load of paper, stuff like that. Refuse. We thought it needed it. It looked kind of like it needed filling in there.

(Testimony of Davis Stanford.)

Q. Was there any water in that depression where you threw this debris—refuse?

A. Not in those days. The river comes in there at times, but I didn't go there when the river was up.

Q. How long did you work with Mr. Kehoe?

A. Quite awhile since he bought out from another man named Frank. I worked for him all the time, now and then.

Q. Do you remember about how many years?

A. Oh, I don't really remember. Maybe three or four years.

Q. And during that three or four year period did you dump in [239] that particular place right along?

A. Well, considerably, and then we used to go at the other end where you saw a dust pile and threw stuff around the yard, but we dumped quite a bit in there.

Q. And you stated you felt that place should be filled up because it was low?

A. Yes; we put in there. It was the lowest place, and we thought we would put it in there where it would do some good.

Q. And do you know whether the man who bought Kehoe out—do you know whether he continued dumping in there?

A. When he had anything extra he hated to go on down Second Avenue.

Mr. Johnson: We object to that as incompetent, irrelevant and immaterial. That is hearsay.

Mr. Taylor: That is not hearsay. I asked "do

(Testimony of Davis Stanford.)

you know whether the man that bought Mr. Kehoe dumped in there.”

A. Oh, Frank. He dumped in there too, sir. And Mr. Wehner.

Q. Mr. Wehner also dumped in there?

A. Yes sir.

Q. Did—while you was working for Mr. Kehoe, did you build that depression up considerable?

A. Well, naturally. We threw wood and built it up. And other people used to throw in there, too. When we went back down you could see people threw in a lot of boxes and so forth in there. [240]

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Johnson:

Q. Mr. Stanford, this Vachon building that you talk about——

A. That is right.

Q. That was on that property—that has been on the property ever since you came to Fairbanks?

A. When I came here; yes, Mr. Johnson.

Q. And you never knew the property before the building was on there, did you? You had never seen it before?

A. I used to go since '12. Every once-in-awhile.

Q. What I am getting at, when you first saw the Vachon property, the building was already on?

A. Yes.

Q. And you came in 1911?

A. Yes sir.

Q. And the building was there then, was it not?

A. Yes.

(Testimony of Davis Stanford.)

Q. How long after you came here in 1911 did you go to work for Mr. Kehoe?

A. I can't tell particular, sir, but from the time he had it—from the time he bought from another gentleman by the name of Frank—I worked for him, but I never kept track of the dates.

Q. Was it two years after you came here—three years—ten [241] years?

A. Three or four years; I never kept track of the time.

Q. Three or four years after you came here?

A. Something like that.

Q. That would be along about 1915 or '16?

A. Yes, something like that.

Q. Now, this ditch you speak of?

A. Yes, sir.

Q. You say that ran from—was that in Lacey Street? Did it run down the Lacey Street by the side of the Vachon building?

A. Well, it come something like that, right along by the slough.

Q. Well, was it in back of the Vachon building, or to one side of it?

A. Well, it was really back of the Vachon building.

Q. I see. Well, and it slanted down towards the slough?

A. Down towards the slough, Mr. Johnson; yes sir.

(Testimony of Davis Stanford.)

Q. How far was it from the Vachon building to the slough, or the river, I mean?

A. Really, Mr. Johnson, I don't know.

Q. It was quite a distance, wasn't it?

A. It was quite a distance.

Q. And this ditch you say you were dumping into, that was all on dry land, wasn't it? [242]

A. Well, some places was deeper than others.

Q. Well, I mean it was all above water?

A. Yes, sir.

Q. When the river was at its normal level?

A. Yes sir.

Q. That ditch was all up on dry land, wasn't it?

A. Yes sir.

Q. And you say—how long—you don't know how long you worked for Mr. Kehoe?

A. No, I don't, sir, but from the time he had his outfit bought, he and Mr. Wehner, I worked for both of them.

Q. Would you say it was one year, two years, or three years?

A. I didn't keep track of the time, but you could find out from Mr. Wehner.

Q. When you did dump there, you dumped about once a month?

A. Something like that. When we had extra.

Q. And you would dump other places?

A. We would take it down to the City dump.

Mr. Johnson: That is all.

(Testimony of Davis Stanford.)

Redirect Examination

By Mr. Taylor:

Q. What kind of a vehicle did you use to dump in there?

A. We started with a horse. Mr. Kehoe got a car, and then Mr. Wehner.

Q. Was it a truck? [243]

A. Yes, goose-neck truck.

Q. Did you use both the horse and wagon and also the truck to dump down there, back of the Vachon building?

A. Well, he would use one and then the other. He started with the horse and then finally got rid of the horse and used the car. He didn't get rid of it, but he used the truck more. It was more convenient.

Q. He would just take the truck down and dump it into that depression?

A. Yes, that long strip.

Q. When the water was high, the river was high, would there be water in that depression?

A. Sure, it would, because the water come up on Front Street sometimes.

Mr. Taylor: That is all.

Mr. Johnson: That is all.

Clerk of Court: That is all, Dave.

(Whereupon, Mr. Davis Stanford was excused as a witness and left the witness stand.)

Mr. Taylor: Mr. Main.

CHARLES MAIN

was called as a witness on behalf of the Defendants, and after being duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Will you state your name, please?

A. Charles Main.

Q. And where do you reside, Mr. Main?

A. Down on the corner of First and Noble.

Q. And that is in Fairbanks?

A. Fairbanks.

Q. How long have you resided in Fairbanks, Mr. Main?

A. Ever since the Fall of 1904.

Q. And has that been a continuous residence in Fairbanks?

A. Well, practically. I have been out on prospecting trips and run a roadhouse 14 miles from here several years, one time.

Q. But your—you always felt this was your home and you were here even when you were on trips away, you would come back to Fairbanks?

A. Yes.

Q. Are you acquainted with the land lying immediately back of the building on the South—or, on the Northwest corner of the intersection of First and Lacey Street?

A. Yes.

Q. Formerly known as the Vachon building? And do you remember the contour of the land back of that building when you came here?

A. Not too well at that time. [245]

(Testimony of Charles Main.)

Q. What was on that property, or where the Vachon building is now—what was on that lot at the time you came here?

A. Well, I couldn't say, myself. I know there was two or three mills there, but to testify just where they sit, I wouldn't say where they sit.

Q. Did you ever go down there and see how they got the logs to the mill?

A. I seen the big eddy down in that section where they took the logs out; yes.

Q. Is that what—did they call that the big eddy?

A. Well, that is what we called it.

Q. And how far did that big eddy run in from the main part of the river, Mr. Main?

A. Well, I figure that at that time that eddy was probably in the neighborhood of thirty or fifty feet wide. It run down—the cut, at that time, to the best of my knowledge, hit down pretty close to the corner of the Fairview Hotel, and make a swing and come back there and made a swing right around in the eddy.

Q. Was that fairly protected in there, then, as a place to keep the logs?

A. Well, it was, because the current was over on the other side and this land above, they had built the bar above and they built that bar up with slabs and sawdust from those mills at the time I recollect, but the current stayed out [246] and that eddy stayed there practically continuously. The current missed it.

(Testimony of Charles Main.)

Q. Now, as the years went by, Mr. Main, did you notice any difference in that eddy—in that part of it where they pulled the logs up?

A. Yes, I noticed a big difference there. The eddy evidently had filled up some, especially out from the back end of the building, much more than it did right under the building, it seemed like. It seemed like that bank built up out from the building quite a bit. Because it was deep water out there at that time.

Q. Was the bank built up enough to prevent the water from coming in under the back of the Vachon building?

A. No, except maybe in real low water.

Q. And about—do you remember how far it was from the high bank where the mill set down to the surface of the eddy, the surface of the water?

A. No, I do not.

Q. Now, later what you call the eddy—the big eddy filled up, did it not, Mr. Main?

A. Filled up; yes.

Q. Do you know what it was filled up with?

A. Well, I imagine—I have seen many eddys fill up with high waters and rubbish thrown in from people, and I imagine it is filled up with both rubbish and silt. Any time you [247] made an eddy the water lays there and settles and it doesn't fill up any hole—it fills up any time.

Q. Do you know if the high water—how much silt would be deposited each high water?

(Testimony of Charles Main.)

A. Well, in an eddy like that it doesn't take a high water to make a big silt. It is settling all the time, as long as the water stands there, it fills up itself.

Q. But after it got filled up to the top of the water, it would require high water to make any further deposits in there, would it not?

A. Yes.

Q. And then, to fill up as high as the back of the Vachon building would require exceptionally high water over quite a length of time, would it not?

A. Yes.

Q. Did you ever see any rubbish dumped down in that? A. Yes, I have.

Q. Was that quite often?

A. Well, I seen it in there several Springs, but I have seen rubbish in there several Springs, but you find that back of everybody's house. I couldn't say whether it was ever buried there, but I could say I had seen it there many Springs; rubbish in there.

Q. Was that usually the accepted condition in the spring?

A. It is the same yet, in the back yards. [248]

Mr. Taylor: You may take the witness.

Mr. Johnson: No questions.

Mr. Taylor: That is all.

(Whereupon, Mr. Charles Main was excused as a witness and left the witness stand.)

Mr. Taylor: I would like to call Mr. Birkliid for just a few questions.

WILLIAM BIRKLID

one of the Defendants, was called as a witness on his own behalf, and after being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Your name, please?

A. William Birkliid.

Q. Where do you live, Mr. Birkliid?

A. Fairbanks.

Q. And what is your occupation?

A. Carpenter.

Q. Are you in business here?

A. I am.

Q. Who with? A. Waxberg.

Q. That is a carpenter contracting business?

A. Waxberg and Birkliid. [249]

Q. Now, you were a partner with Mr. Waxberg a year ago this Spring, were you?

A. I was.

Q. And were you in Fairbanks at the time of the high water last Spring? A. I was.

Q. And you were down at your place of business during that high water? A. Yes, we were.

Q. About how much water got into your building down there, Mr. Birkliid?

A. We measured it and it measured about sixteen inches inside the building.

Q. And how long did it set there? Before the water fell?

(Testimony of William Birkliid.)

A. Gosh, I don't remember the exact days. But we lost about a weeks work, or more, out of the shop there, so I guess it was about four or five days in the shop. I don't remember the exact dates.

Q. Now, after the water went down, how much sediment was left on the walls of the shop?

A. On the floor?

Q. Umhumm?

A. Well, in spots there wasn't any, but there was a little in other places. We washed it out with water and just swept it out. There wasn't a great deal. [250]

Q. Was there any deposits of sediment outside around the building?

A. Well, there wasn't a great deal to notice. It was quite muddy there, anyway, but then on the back, as far as I could see, where the grass was growing, there wasn't any sediment at all.

Q. I hand you Defendants' Exhibit "M," that was taken right back of the shop.

Mr. Johnson: Defendants' Exhibit, did you say?

Q. Plaintiffs' Exhibit "M." Do you recognize the location of that photograph, Mr. Birkliid?

A. To be honest with you, I would say I couldn't recognize it. That may be right back there; yes. But that is——(interrupted).

Q. Did you hear the testimony of Mr. Griffin this morning? A. No.

Q. Were you present at your shop yesterday when I went down there? A. Yes, I was.

(Testimony of William Birkliid.)

Q. And do you remember going back of the building—back of your building? A. Yes.

Q. Where the grass is? A. Yes, I do.

Q. How deep is that grass? How high is it?

A. Oh, it varies from two to three inches. [251]

Q. Now, at the time you were there yesterday, was there any evidence of any silt in that grass?

A. No, I couldn't say that there was.

Q. There was no perceptible change in the contour of the ground because of that flood?

A. No.

Mr. Taylor: You may take the witness.

Cross-Examination

By Mr. Johnson:

Q. Mr. Birkliid, the ground in back of your building has been covered with a great deal of snow all winter, has it not? A. It has.

Q. And that snow has since melted and gone away, is that correct? A. That is.

Mr. Johnson: That is all.

Redirect Examination

By Mr. Taylor:

Q. Just a moment. I would like to ask you just one more question. Now, Mr. Birkliid, the footings of your building—how are they constructed?

A. Well, they are constructed with mud pads and posts set on the mud pads.

Q. And how deep did you go for the footing?

A. Set it on top of the ground. Just leveled it off a little. [252]

(Testimony of William Birklid.)

Q. Did you put the top of the footings just below the general level of the ground?

A. No.

Mr. Taylor: That is all.

Mr. Johnson: That is all.

(Whereupon, Mr. William Birklid was excused as a witness and left the witness stand.)

Mr. Taylor: The Defendant rests, your Honor.

Mr. Johnson: The Plaintiffs' rest.

The Court: How much time do you gentlemen want for argument?

Mr. Taylor: Not very long.

Mr. Johnson: Well, I don't think it should take over thirty or forty-five minutes, your Honor. I would like to have at least forty-five minutes. If I don't do that much, that will be all right.

The Court: All right. I will limit you to forty-five minutes. Do you want the argument reported?

Mr. Johnson: No; I am not particular.

Mr. Taylor: Not necessarily, your Honor.

(Whereupon, the Court heard arguments by counsel, but they were not reported by the Court Reporter; and after arguments were completed, the Court took the matter under advisement.)

United States of America,

Territory of Alaska—ss.

I, Margaret M. Wilkins, of Fairbanks, Alaska, hereby certify:

That I am the Official Court Reporter in the District Court for the Territory of Alaska, Fourth

Division; that I attended the trial of the cause entitled "Alfheld Hjalmar Nordale and Arnold Mauritz Nordale, co-trustees of the Nordale Estate Trust, Plaintiffs, versus A. E. Waxberg and William A. Birkliid, Defendants, Number 5824," at Fairbanks, Alaska, on May 9 and 10, 1949, and took down in Stenotype the testimony given and proceedings had thereat; that I thereafter transcribed said Stenotype notes, and the foregoing pages, numbered 1 to 253, both inclusive, comprise a full, true and correct statement and transcript of such testimony and proceedings, to the best of my ability.

Dated at Fairbanks, Alaska, this 1st day of August, 1949.

/s/ (MRS.) MARGARET M.

WILKINS,

Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all Pleadings, Motions, Orders, etc., filed in the above entitled cause, viz.;

	Page
Pleadings:	
Amended Complaint	1
Answer to Plaintiffs' Amended Complaint	12

	Page
Motions, Orders, etc.:	
Original Complaint	14
Original Answer	25
Summons	27
Motion to set cause for trial	28
Notice of Hearing on above Motion	29
Order Setting	30
Order Vacating Setting	31
Stipulation in re filing an Amended Complaint	32
Order in re filing an Amended Complaint	33
Stipulation in re the Deposition of Fred Parker, Sr.	34
Deposition of Fred Parker, Sr.	36
Stipulation in re setting cause for trial	52
Order setting cause for trial	53
Stipulation in re Continuance of Trial	54
Order vacating former setting and re-setting ..	55
Minute Order Resetting cause for trial	56
Subpoena for Plaintiff	57
Subpoena for defendants and Marshal's Return	58
Trial by Court, May 9, 1949 to May 10, 1949, incl.	60
Opinion of trial Judge	64
Order in re Exhibit "F"	70
Motion for New Trial	71
Notice of Hearing on above	72
Hearing on above Motion	73
Order in re New Trial, denied	74
Findings of Fact and Conclusions of Law	75
Judgment	80

	Page
Judgment Roll	82
Cost Bill	83
Objections to Cost Bill with Clerk's Ruling ...	84
Notice of Appeal from Clerk's Ruling on Cost Bill	86
Motion for an Order Staying Execution	87
Notice of Appeal	88
Order re Stay of Execution and Hearing on Ruling on Cost Bill	89
Order in re Defendant's Appeal from Clerk's Ruling on the Cost Bill	90
Notice of Exceptions to Supersedeas Bond	91
Notice of Hearing on Supersedeas Bond	92
Order setting above for Hearing	93
Minute Order in re Objections to Supersedeas Bond	94
Supersedeas Bond	95
Order in re Supersedeas Bond	97
Motion for an Order Extending Time to file, record, and docket cause	98
Order extending time	99
Stipulation in re Exhibit "F" with Exhibit attached	100
Designation of Record	102
Transcript on Appeal	1-254, Incl.

Witness my hand and the seal of the above-entitled Court, this 13th day of September, 1949.

[Seal] /s/ JOHN B. HALL,

Clerk of the District Court, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: No. 12356. United States Court of Appeals for the Ninth Circuit. A. E. Waxberg and Wm. A. Birklid, Appellants, vs. Alfheld Hjalmar Nordale and Arnold Mauritz Nordale, co-trustees of the Nordale Estate Trust, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed September 15, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12356

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,
vs.

ALFHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees of
the Nordale Estate Trust,
Appellees.

STATEMENT OF POINTS

The Appellants state that the points upon which they intend to rely on this appeal are as follows:

1. That the Court erred in overruling Appellants' objections to the introduction of evidence at

pages 13, 152, 153 and 154 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

2. That the Court erred in overruling Appellants' Motion to Dismiss at page 165 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

3. That the Court erred in overruling Appellants' Motion for a new Trial at page 71 of the original certified record.

4. That the Court erred in its Findings of Fact and Conclusions of Law, pages 75 to 79 of the original certified record.

5. That the judgment of the Court was contrary to the evidence and to the law.

/s/ WARREN A. TAYLOR,

Attorney for Appellants.

Service and receipt of a copy of the foregoing Statement of Points is hereby acknowledged this 12th day of September, 1949.

/s/ MAURICE T. JOHNSON,

Attorney for Appellees.

[Endorsed]: Filed Sept. 15, 1949.

[Title of Court of Appeals and Cause.]

To: The Clerk of the United States Court of Appeals for the Ninth Circuit

DESIGNATION OF RECORD

The Appellants hereby designate by reference to the pages of the original certified record the following portions of said record which are material to the consideration of this appeal:

Amended Complaint	pp. 1-11
Answer to Plaintiffs' Amended Complaint	pp. 12-13
Motion for New Trial	p. 71
Findings of Fact and Conclusions of Law	pp. 75-79
Judgment	pp. 80-81
Notice of Appeal	p. 86
Motion for an Order Extending Time to File,	
Record and Docket Cause	p. 98
Order Extending Time to File, Record and	
Docket Cause	p. 99
Stipulation and Attached Exhibit	pp. 100-101
Designation of Record	p. 102
Entire Reporter's Transcript of Trial	

All of the Exhibits admitted in evidence at the trial

/s/ WARREN A. TAYLOR,
Attorney for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 15, 1949.

[Title of Court of Appeals and Cause.]

To: The Clerk of the United States Court of Appeals for the Ninth Circuit

COUNTER DESIGNATION OF RECORD

The Appellees hereby designate by reference to the pages of the original certified record the following portions of said record which they consider are material to the consideration of this appeal, and they request that said portions be printed in the record:

Stipulation in Re Filing Amended Complaint p. 32

Order in Re Filing An Amended Complaint . . p. 33

Stipulation in Re the Deposition of Fred

Parker, Sr. p. 34

Opinion of the Honorable Harry E. Pratt,

Trial Judge p. 64

Dated this 15th day of September, 1949.

/s/ MAURICE T. JOHNSON,

Attorney for Appellees.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 19, 1949.

No. 12,356

IN THE

United States Court of Appeals
For the Ninth Circuit

A. E. WAXBERG and W. M. A. BIRKLID,
Appellants,

vs.

ALPHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees
of the Nordale Estate Trust,
Appellee.

BRIEF FOR APPELLANTS.

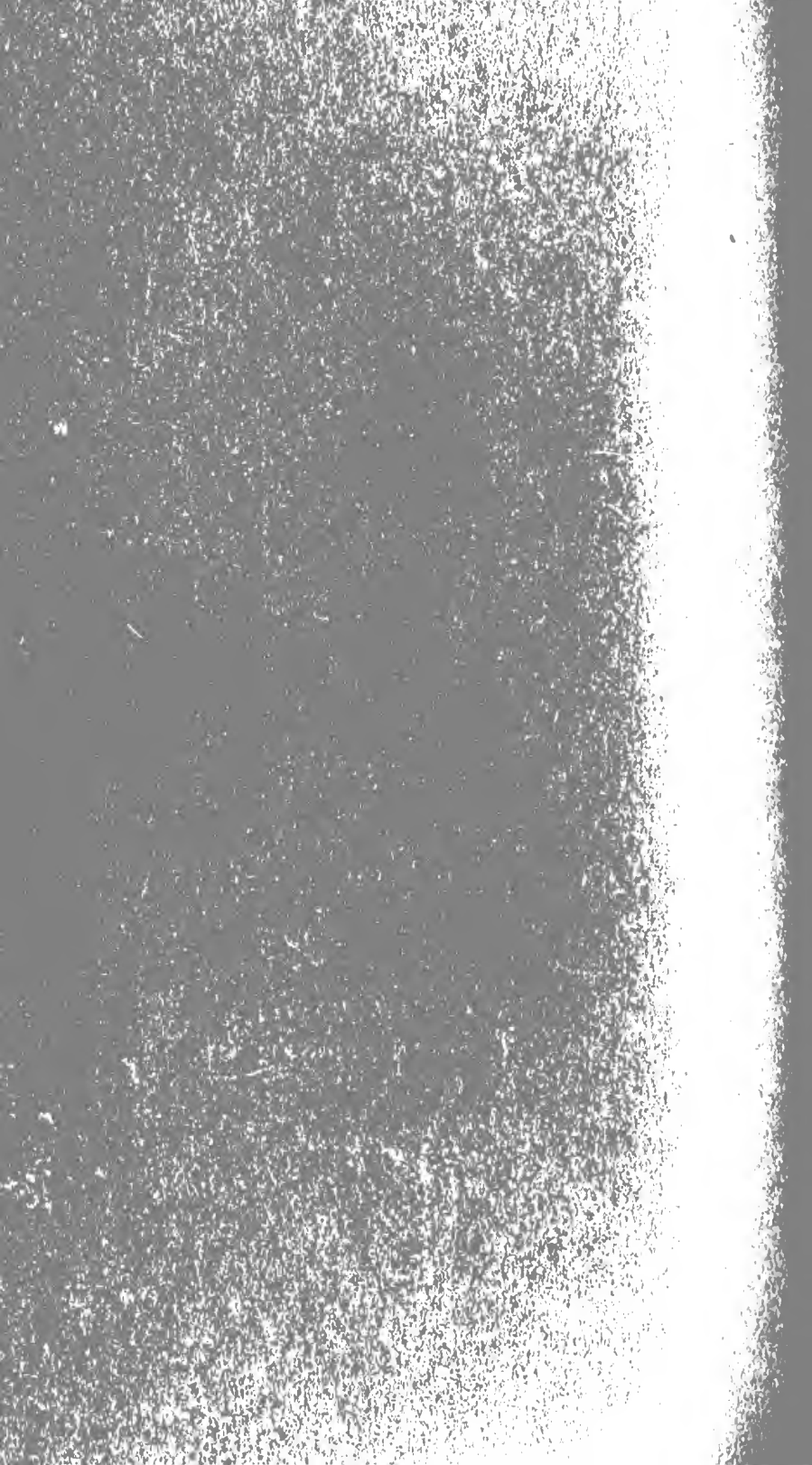
WARREN A. TAYLOR,
GEORGE B. McNABB, JR.,
Fairbanks, Alaska,

BAILEY E. BELL,
Anchorage, Alaska,
Attorneys for Appellants.

FILED

JAN 18 1950

PAUL P. O'BRIEN,



Subject Index

	Page
Jurisdiction of District and Appellate Courts.....	1
Statement of case	2
Statement of points relied upon for reversal.....	3
First point relied upon for reversal.....	3
Conclusion to first point	16
Second point relied upon for reversal.....	16

Table of Authorities Cited

Cases	Pages
Black et al. v. American International Corporation, 264 Pa. 260, 107 A. 737	11, 13
City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789...	13
City of Newport Beach et al. v. Fager et al., 39 Cal. App. (2d) 438, 442	11, 13
In re Driveway in City of New York, 46 Misc. Rep. 157, 93 N.Y.S. 1107	10
Lorino v. Crawford Packing Co., 142 Tex. 57, 175 S.W. (2d) 410	10
Nevin v. Friedauer, 198 App. Div. 250, 190 N.Y.S. 682.....	10, 13
O'Neil v. Murray, 120 Misc. Rep. 151, 198 N.Y.S. 705.....	11
People ex rel. Blakeslee v. The Commissioners of the Land Office, 135 N.Y. 447, 32 N.E. 139.....	10
St. Clair v. Lovington, 23 Wall. 46, 23 L. Ed. 59.....	9
Sage v. Mayor, etc. of City of New York, 154 N.Y. 61, 47 N.E. 1096	10, 11
Saunders v. New York Cent. & H.R.R. Co., 144 N.Y. 75, 38 N.E. 992	10
Simpson v. Martin, 174 Ark. 956, 298 S.W. 861.....	17
Steers v. City of Brooklyn, 101 N.Y. 51, 4 N.E. 7.....	11
Wayne v. Diboff et al., 9 Alaska Reports 230.....	15
Western Pacific Railway Co. v. Southern Pacific Railway Co., 151 Fed. 376	17
Wilson v. Watson, 144 Ky. 352, 138 S.W. 283.....	17

Codes

28 U.S.C., Section 1291.....	2
------------------------------	---

No. 12,356

IN THE
United States Court of Appeals
For the Ninth Circuit

A. E. WAXBERG and W. M. A. BIRKLID,
Appellants,

vs.

ALPHELD HJALMAR NORDALE and AR-
NOLD MAURITZ NORDALE, co-trustees
of the Nordale Estate Trust,
Appellee.

BRIEF FOR APPELLANTS.

JURISDICTION OF DISTRICT AND APPELLATE COURTS.

This action was commenced by Appellee in the District Court for the Territory of Alaska, Fourth Judicial Division. On the 22nd day of September, 1948, an amended Complaint (T. R. pp. 2 to 6) was filed in said cause whereby Appellee sought to recover possession from the Appellants of certain real property located within the said Fourth Judicial Division and damages for the detention of same. Issues were joined on said amended Complaint by Appellant's answer. (T. R. pp. 18 and 19.)

Judgment was entered for Appellee on the 25th day of June, 1949. (T. R. pp. 36-39.) Notice of Appeal was served and filed on the 29th day of June, 1949. (T. R. p. 39.) After motion by Appellants to extend time to file, record and docket cause was granted by the said District Court (T. R. pp. 40-41), the appeal was duly perfected and lodged in this Court within the time allowed by law and by the extension granted by the said District Court.

The right of appeal from the said District Court to this Court is provided for by 28 U.S.C. sec. 1291.

STATEMENT OF CASE.

In this case, Appellee sought to recover certain land from the Appellants by an action in ejectment. Appellee alleged, and sought to prove, that the land for which recovery was asked was an accretion to Appellee's upland. Appellants sought to show that the land in question was not an accretion but an artificial fill.

Appellants complain that the trial Court failed to consider the import of its evidence that the land in controversy was an artificial fill and erroneously found that the Appellee had sustained its burden of proof that the said land was formed by accretion to the upland. The manner in which these questions are saved is set out in the "Statement of Points Relied Upon for Reversal", *infra*.

**“STATEMENT OF POINTS RELIED UPON
FOR REVERSAL.”**

FIRST POINT RELIED UPON FOR REVERSAL.

The first point Appellants rely on for reversal is the District Court's overruling Appellants' Motion for a New Trial (T. R. pp. 27 and 28) and the said Court's finding (paragraph IV, T. R. p. 31 of the Findings of Fact and Conclusions of Law) that the amount of debris deposited by third persons "was an infinitesimal per cent of the amount of accretion and there was nothing in it to show that it had had an effect upon the forming of the accretion." Appellants, by the second paragraph of their Motion for New Trial (T. R. p. 28) called the Court's attention to its failure to take into consideration Appellants' evidence that the land in question "was not an accretion but was formed by the deposit of waste and debris on the shore." These matters were assigned as errors in this Court. (T. R. pp. 302-303.) The District Court was apparently of the opinion that had Appellants shown such deposits the Appellee would still have been entitled to recover possession of the disputed premises. (T. R. p. 23 of District Court's Opinion, T. R. pp. 21 to 27.) It is Appellants' contention that their evidence at the trial of cause showed most of the alleged "alluvium" to which Appellee lays claim to consist of artificial fill and not to constitute accretion as defined by law; and that the title to artificial fill caused by the deposits of debris even without the consent or knowledge of the littoral owner and even though some evidence of alluvial deposits is present, does not vest in the littoral owner.

Testimony of Appellants' witnesses established that the land occupied by Appellants for which Appellee seeks recovery was artificial fill—debris of all sorts mixed together with soil and presenting no orientated strata which would be present if the deposits were alluvium resulting from the process of accretion.

Concededly, the action of the Chena River deposited some silt on and along the shores lying in front of the Appellee's land. The amount of this natural deposit, however, was very small, considerably less than the artificial fill and what alluvium was present must, in the nature of things, have been considerably accelerated by the use of the shores as a dump yard.

A. E. Waxberg (T. R. pp. 217-231 and pp. 254-265), one of the Appellants, after having testified to his occupation of the land in question by moving a structure thereon (T. R. p. 220), related that he dug a hole in front of the structure approximately four and one-half ($4\frac{1}{2}$) feet wide and seven (7) feet deep in order to install an oil tank. (T. R. pp. 224 and 225.) Mr. Waxberg testified that several photographs were taken of the hole and the filling removed therefrom at various stages in the process of excavation. The photographs were introduced as Appellants' (then defendants') Exhibits "A", "B" and "C". An examination of these Exhibits, coupled with Waxberg's identifying testimony, show that the composite structure of the fill removed in the excavation of the hole consisted of logs, tin cans, old pieces of board and boxes, drum hoops, barrel staves, a clincher tire

rim, a dark area of filled soil and some sedimentary deposit. (T. R. pp. 225 to 231.) The hole from which this fill was removed was approximately thirty (30) feet, according to Mr. Waxberg's testimony, from the rear of the north end of Appellee's building (T. R. p. 225), which according to Appellee's testimony (T. R. pp. 92 and 93) had been built at the water's edge in 1906 with a foundation of piling on the north end. It is to be noted that Waxberg testified that the pilings in the middle, the north end of that building, were six (6) to seven (7) feet long. (T. R. 221.) Thus, the seven foot hole dug by Appellants was well below the original water level of the Chena River. Waxberg, after being excused while Richard Ragle testified, also testified that he had seen Mr. Wehner, a previously identified city employee (T. R. p. 170), dumping dirt behind Appellants' structure at the end of Lacey Street. (T. R. p. 258.)

Richard Ragle was the next witness called by the Appellants. (T. R. pp. 231 to 253.) He qualified as an expert witness, being a professor of Geology at the University of Alaska. Having stated that he had examined two test pits on the land in question which showed the material removed therefrom to consist of sundry debris mixed together without orientation with dirt, unstratified soil, he testified (T. R. p. 236) that the material found "had not been transported to its present site by any natural agency. It had not suffered any differential flotation due to transportation by running water, and there was not stratification; fragments of wood that were present below the sur-

face indicated that water was not present at the time this material was deposited.

Having examined Appellants' (then defendants') Exhibits "A" and "B" and testifying that they revealed similar conditions to the pits he examined, he gave his expert opinion as to the nature of the ground in dispute. (T. R. p. 242.)

"I would state, in my opinion, that there is an artificial bearing in thickness from two to eight feet, resting between the river bank and the back of the buildings that front on First Avenue. That the materials present in their present arrangements could not have been deposited by a natural agency."

Upon examination by the Court (T. R. p. 243), he stated that his judgment was also based on "erosion cuts".

The testimony of Appellants' remaining witnesses, Richard Rothenburg (T. R. pp. 266-275), Albert Norlin (T. R. pp. 275 to 282), Davis Stanford (T. R. pp. 283-290) and Charlie Main (T. R. pp. 291-295), showed that this land had been used as a dump yard by a "scavenger" outfit and the public in general, thus explaining how the artificial fill testified to occurred.

It is, perhaps, interesting to note that this latter testimony was corroborated to a certain extent by Appellee's own witnesses: Adolph Wehner (T. R. pp. 170, 171 and 174); Leo Preg (T. R. p. 198).

As far as Appellants' theory of the substantive rule of law applicable to this case, it is pertinent to ob-

serve that little or no use was ever made of the portion of land in controversy. Appellant, Waxberg, testified in direct examination that there were no improvements on the land when he occupied the same in 1948 (T. R. p. 217) and this was not controverted by Appellee. The land had been building up, according to Appellee's theory of the case, from 1903 to date. The "accreted" portion at the time of the trial extended approximately two hundred (200) feet from the original north boundary of Lot 6, Block 4, to which Appellee acquired title from the Townsite Trustee in 1922. It is only fair to assume that a usable or occupiable portion of that "accretion" had formed by 1922; yet from 1922 until the Appellants moved on the land in 1948, no constructive use had ever been made of the land. Attention is called to Appellee Alpheld Hjalmar Nordale's testimony (T. R. pp. 97 and 98) where he testifies that, with respect to the north end of the lot (unusual for Appellee must have been referring to the land in controversy) he had "kept it clear and maintained it physically". He remembered one specific instance of so doing "in the fall of 1945" when he had had the brush cleared.

Assuming that Appellants' evidence as set out establishes that most of the land in controversy consists of artificially deposited materials, then the trial Court has taken a mistaken view of the substantive law applicable to such a fact-situation.

The trial Court seeks to hang its opinion on two horns: first, as trier of fact, the District Judge states

(T. R. p. 22): "The amount of such debris was an infinitesimal per cent of the amount of alluvium and there was nothing in it to show that it had any effect upon the forming of the alluvium." Second, as applicer of substantive law, the District Judge, then states that a contrary finding of fact wouldn't make any difference anyway, indicating, perhaps, uncertainty in his findings of fact.

"Even if defendants had shown that debris had been deposited artificially in such quantities as to increase the deposit by accretion, it would nevertheless have been immaterial as the riparian owner had no part in making the artificial deposits." (T. R. p. 23.)

Appellants concede that Appellee had no knowledge of the deposits and that the deposits were made entirely by third persons; they do not concede the proposition of law as stated. It is submitted that the District Court has failed to distinguish between fact-situations where structures have been built in the water above or below the littoral owner's shore, thus affecting the flow of current and the resultant deposit of sedimentary materials, and cases where the shore and waters adjoining the upland have been artificially filled. The difference sought to be drawn is one between the water itself acting as the depositing agency though its flow is affected by causative factors artificially constructed and the deposit of materials by some agency other than water.

Cited as authority for the proposition of law laid down by the trial Court, *supra*, is the case of *St. Clair*

v. Lovington, 23 Wall. 46, 23 L. Ed. 59. We accept the definition of accretion as laid down by the United States Supreme Court in that decision:

“It is insisted by learned counsel for plaintiff in error that the accretion was caused wholly by *obstructions placed in the river above*, and that hence the rules upon the subject of alluvium do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The *proximate* cause was the deposits made by the water. The law looks no further. Whether the *flow of the water was natural or affected by artificial means* is immaterial. In the light of the authorities, ‘alluvium’ may be defined as an addition to riparian land, gradually and imperceptibly made by water to which the land is contiguous. Whether it is the effect of natural or artificial causes makes no difference.” (Italics supplied by the Appellants.)

The above language, we submit, points out clearly the failure of the District Court to distinguish clearly between artificial causation and artificial fill.

As is apparent from an examination of the above definition, a deposit of material by the action of water is an essential part of the definition of accretion and, by definition, the doctrine of accretion can have no applicability to the deposit of materials by human agency. In the instant case, the Appellee cannot predicate any right to recover the land in controversy upon the doctrine of accretion.

That the doctrine of accretion is not applicable where the artificial fill is made by the littoral or upland owner is clear.

Lorino v. Crawford Packing Co., 142 Tex. 57, 175 S.W. (2d) 410;

People ex rel. Blakeslee v. The Commissioners of the Land Office, 135 N.Y. 447, 32 N.E. 139; *Saunders v. New York Cent. & H. R. Co.*, 144 N.Y. 75, 38 N.E. 992;

Nevin v. Friedauer, 198 App. Div. 250, 190 N.Y.S. 682.

Nor by definition does it apply to fill by third persons other than the upland owner.

“The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water, and making it dry.” *Sage v. Mayor, etc. of City of New York*, 154 N.Y. 61, 47 N.E. 1096, 1103.

“Title by accretion can be acquired only when the accretion is due to a gradual and natural deposit of soil along the border of the upland.” *In re Driveway in City of New York*, 46 Misc. Rep. 157, 93 N.Y. S. 1107.

“In order for littoral owner to be entitled to accretions which may form upon the upland, such accretions must have been the result of natural causes and must have been formed gradually and imperceptibly. Accretions which have been added to the upland by artificial means do not inure to the benefit of the littoral owner, but remain in the

state or its successor in interest." *City of Newport Beach v. Fager*, 39 Cal. App. (2d) 438, 442.

"It is equally true that this principle does not apply where land has been made by human agency by depositing material on a river bottom. Such accretions are not 'gradual and imperceptible' and are not 'brought down by rivers,' or other streams." *Black et al. v. American International Corporation* (1919) 264 Pa. 260, 107 A. 737, 738.

Accord: *O'Neil v. Murray*, 120 Misc. Rep. 151, 198 N.Y.S. 705.

It is to be noted that the cases quoted from involve fact-situations where a division of government has been the responsible agency for the artificial fill and it is to be candidly admitted that the case of *Black et al. v. American International Corporation*, supra, places emphasis upon the factor of knowledge and consent of the upland owner, and that the case of *Sage v. Mayor*, supra, indicates that a different result might be reached if the artificial fill had been caused by wrongdoers or trespassers.

Considering the definition of accretion, as laid down by the authorities, it is submitted that the legal status of the filler or the state of mind of the upland owner can have no effect on whether or not there has been, in fact, accretion to the upland.

Sage v. Mayor, supra, insofar as the case would distinguish between deposits by wrongdoers and deposits by third persons is based on the prior New York decision of *Steers v. City of Brooklyn*, 101 N.Y. 51, 4 N.E.

7. In that case the City of Brooklyn had entered on Steer's premises to construct a pier and the pier was affixed to the upland. The Court talked in terms of accretion with respect to the affixation of the pier; however, it is difficult to conceive how the doctrine of accretion could be applicable to such a case and the real basis of the decision would seem to be whether or not a trespasser should be allowed to claim title to a fixture which he had wrongfully attached to another's land. As far as Appellants can ascertain, the holding of the *Steer* case and the dicta of *Sage v. Mayor*, supra, have not been reiterated in New York case law. Of course, the distinction might retain some vitality where the trespasser himself laid claim to artificial fill which is not true in the case being appealed.

Nor, as stated before, does the fact of knowledge of the process of filling seem of any weight in determining where the doctrine of accretion is applicable. The filling would not be an alluvial deposit—that is, would not be the result of the action of the water. True, from knowledge, it might be inferred that the upland owner waived certain littoral rights such as access to the stream, but it is beyond Appellants' discernment to conceive how the upland owner's factual unawareness can convert artificial fill into accretion. Such a doctrine would place a premium on unawareness as well as create a convenient indifference to whether one's shores were to be used as a dump yards or not—a state of mind hardly calculated to encourage civic beautification.

It is to be further noted that Appellee has introduced no evidence to show that its title when acquired from the city extended beyond the north boundary of the Townsite of Fairbanks and they do not claim to own beyond the highwater mark of the Chena River. The north boundary of the Townsite of Fairbanks and the highwater mark of the Chena River are apparently claimed by Appellee to be the same. The title to the Chena River bed to the highwater mark must be assumed to be in the United States Government. Title to river bed filled in and made dry could not have resulted in a change of title from the United States Government to the Appellee. *Black et al. v. American International Corporation*, supra, *City of Los Angeles v. Anderson*, 206 Cal. 662, 275 P. 789, *City of Newport Beach et al. v. Fager et al.*, supra, *Nevin v. Friedauer*, supra.

In the case of *Nevin v. Friedauer*, cited last, a city contractor had dumped dredged fill along the margin of the upland. Title to the bed of the water filled in was found to be in the City of New York. The New York Court held that the upland owner did not take title to the fill. The Government had title to the bed and the fact that it was raised above the surface of the water could not affect that title. (p. 682.) "She (the plaintiff) now seeks to take advantage of the unexplained vagaries of some government contractor who has filled in an additional block of the city's land."

It is submitted that the interest of the United States Government is presented by the record. Al-

though Appellants erroneously failed to save the question of their rightful or lawful entry on the land in dispute by not specifying as error the Court's refusal to permit the introduction of evidence concerning their location of the land as a portion of the public domain (T. R. p. 218); still, the interest of the Government becomes apparent in the light of several questions asked by Appellee's own counsel:

Direct examination of Lee Linck, Appellee's witness:

"Q. And did you indicate on this plat (Plaintiff's Exhibit 3) the portion of the property in question which has been occupied or *located* by Waxberg and Birklid, the defendants, in accordance with their *location notice*.

A. Yes, we have, it is indicated in—by a hatched line on this map.

Q. And that follows around the *metes and bounds description as given in their location notice*?

A. Yes, it does." (T. R. pp. 120 and 121.)

And on p. 127 of the T. R., Appellee's attorney stated in answer to a question propounded by the Court:

"* * * Paragraph III was the description based on the *location notice* of the Defendants."

Thus, the entry of Appellants and location of the land as a portion of the public domain is manifest from the record. This is a material consideration for this Court in view of the fact that no claim has been laid by Appellee to land below the ordinary high water mark.

As indicated earlier in the brief, Appellants also feel that Appellee's failure to make any constructive use of the premises in question is a material factor for the consideration of this Court.

In *Wayne v. Diboff et al.*, 9 Alaska 230, Judge Alexander of the District Court stated, p. 232:

"The law of accretion in the United States was adopted with the common law of England and has never been changed by the Constitution of the United States or any law passed by Congress; and accretions have always been granted to the adjoining owners on the theory that additions to such land are compensation for the losses sustained by decretion or the wasting away of the uplands, and on the theory that small and insensible portions of land should not be allowed *to be idle* without an owner between the upland and seashore." (Italics supplied by Appellants.)

If the basis of the doctrine of accretion is, in part, one of preventing economic waste, then Appellee surely cannot complain that the withholding of that application in the instant case would controvert that purpose. *A fortiori*, he cannot complain where the facts do not show alluvium but are artificial deposit.

Furthermore, it requires no citation of authority that another of the bases of the doctrine is that a riparian or upland owner should not be deprived of access to the water. Again Appellee cannot complain of a finding that the doctrine is not applicable in the instant case, there being no showing by Appellee that accessibility was necessary and important to him.

CONCLUSION TO FIRST POINT.

In determining the rule of law applicable to the present fact-situation this Court should bear in mind not only the adjudicated cases but also reasons of policy why one principle of law should be applicable rather than another.

Alaska is a relatively new area of settlement and as such its people may profit from the mistakes made in other areas belonging to the United States in the process of settlement. This Court may judicially notice that in recent years matters of stream pollution have occupied the nation's attention and that at the municipal level of government the trend has been towards cleaning up the shores and banks of streams and lakes and to pass more strict laws against the indiscriminate dumping of waste materials and debris. It is submitted that the applicable law should not encourage nor compensate idle inattention by upland owners of what use is made of the adjoining shores and beaches.

SECOND POINT RELIED UPON FOR REVERSAL.

The second point Appellants rely on for reversal is the District Court's denial of Appellants' Motion to Dismiss (T. R. p. 216) and the Court's denial of Appellants' Motion for New Trial (T. R. p. 27) with respect to paragraph I thereof; and that the said District Court erroneously found that the land in dispute was formed by the process of accretion. (T. R. par. III of District Court's Finding of Facts.) The

matters were designated as error in this Court. (T. R. pp. 302 and 303, Statement of Points Nos. 2, 3 and 4.) The question sought to be raised is whether or not Appellee sustained its burden of proof that the disputed land was formed by accretion as defined by law. Appellee sought to prove that the land in dispute was alluvium deposited imperceptibly by the action of the Chena River along the upland.

In *Wilson v. Watson*, 144 Ky. 352, 138 S.W. 283, the Court of Appeals of Kentucky defined "alluvium" and "accretion" as follows, p. 284:

"'Alluvium' is a deposit, usually of mingled sand and mud, resulting from the action of fluvial currents, and is applied by geologists to the most recent sedimentary deposits, especially such as occur in the valley of large rivers.

"'Accretion' is the increase or growth of property by external accessions, as by alluvium naturally added to land situated on the bank of a river, or on the sea shore."

Accretion has been defined by this Court as the slow, imperceptible and natural addition to original lands, by water receding therefrom and filling in by deposits of sand, mud or vegetation raising the surface of the land above water level. *Western Pacific Railway Co. v. Southern Pacific Railway Co.*, 151 Fed. 376.

The burden of proof to show that the formation in question was accretion as defined above was, of course, imposed on Appellee. *Simpson v. Martin*, 174 Ark. 956, 298 S.W. 861.

An examination of Appellee's evidence, giving it its full weight, reveals that it fell short of sustaining that burden.

Appellee's first witness, A. H. Nordale, testified that the upland was flooded once or twice a year leaving some alluvial deposit and that over a period of years the disputed premises were building up. How much alluvial deposit was left after each flood does not appear nor is the period of years to which Nordale referred to apparent from the record. (T. R. pp. 94 to 96.)

Appellee's witness, Fred Parker, Sr., stated that between the years 1903 and 1906 a mill pond along the upland kept filling in with silt. (T. R. p. 151.) He testified also with respect to appellee's Identification 2 that a beach appearing thereon was the result of the deposit of silt "constantly coming down the river and building it up." (T. R. p. 155.) Identification 2 was a photograph of the premises taken in 1915. The witness Parker stated that he had not observed the action of the river "much" between the year 1906 and the year 1921 (T. R. p. 153), so that anything he stated about the deposit of silt along the upland must be considered largely a conclusion. Giving the greatest weight possible to Parker's testimony, it can only be taken as establishing that between the years 1903 and 1906 there was an undefined quantity of silt deposited in a mill pond in front of the upland.

Perhaps Appellee's best testimony was elicited from Adolph Wehner. (T. R. pp. 164-178.) He testified that the shore had been gradually building up through the years by the action of the river. However, on both direct and cross-examination he admitted that he, himself, along with other people had done a considerable amount of dumping on the disputed premises.

Appellee's next witness, Oscar Engstrom (T. R. 178-185), did not testify that there was any accretion to the premises in question. In fact, he testified that during his period of working at the sawmill in 1904 that the mill pond did not appear to be filling up with silt. (T. R. p. 181.)

Leo Preg (T. R. pp. 185 to 201) testified that the disputed premises had built up through the years by the deposit of silt. He did not testify to any examination of the nature of the deposit. A clue perhaps to the value of any testimony as to the nature of the accession is given by the witness' response to a question on direct examination (T. R. p. 190) :

“Q. Has that been due to the action of the river?

A. Why sure. Nothing else.”

It shows, perhaps, that in the absence of an analysis of the composite structure of the premises, that any witness' testimony that the premises were built up by the deposit of silt is largely a conclusion, he knowing of no other factors.

The testimony of Appellee's witness, Reuel Griffin (T. R. pp. 201 to 209), was an attempt by Appellee to show, by photograph, the amount of alluvial deposit

that remained after a particular flood. Nothing was established by this testimony as, on cross-examination, the condition of the premises prior to the occurrence of the particular flood was not shown, so that the photograph taken of the "alluvial deposit" might have been a combination of alluvial deposits from several floods.

Perhaps, in the absence of any evidence showing that the deposit consisted of something other than alluvium, the testimony of Appellee's witnesses would be sufficient to make out a *prima facie* case of "accretion". Giving Appellee's evidence the most weight possible, it has established that the land in question has built up slowly over a period of years and that it is the conclusion of Appellee's witnesses that the deposit of silt by the Chena River was the responsible factor for such building up. It is submitted, however, that more should be required in the way of proof than testimony by several witnesses that the land was being "built up" by the deposit of silt borne by the waters where evidence has been introduced that the nature of the formation was examined and found not to be alluvium but artificial fill. (See discussion of Appellant's evidence under First Point Relied Upon for Reversal, *supra*.) There is no testimony by any of Appellee's witnesses that they examined the premises. An essential element of the doctrine of accretion being imperceptibility in the formation of alluvium, testimony that the premises in question were being built up by the alluvial deposit of silt must necessarily be

speculative without a confirming analysis of the deposit.

Dated, Fairbanks, Alaska,
January 9, 1950.

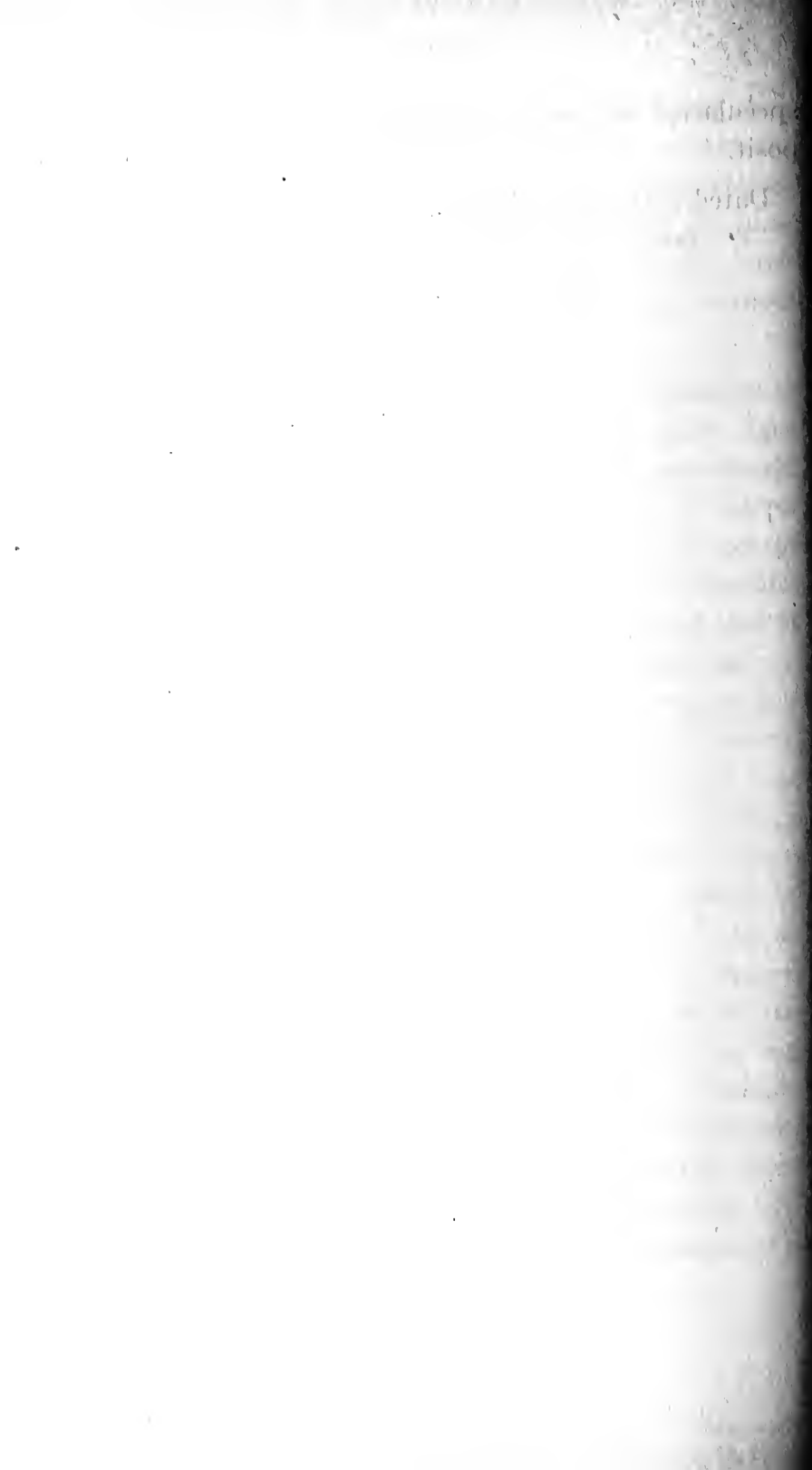
Respectfully submitted,

WARREN A. TAYLOR,

GEORGE B. McNABB, JR.,

BAILEY E. BELL,

Attorneys for Appellants.



No. 12,356

IN THE

United States Court of Appeals
For the Ninth Circuit

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,

VS.

ALFHELD HJALMAR NORDALE and ARNOLD
MAURITZ NORDALE, Co-trustees of the
Nordale Estate Trust,
Appellees.

BRIEF FOR APPELLEES.

MAURICE T. JOHNSON,
Fairbanks, Alaska,

Attorney for Appellees.

Subject Index

	Page
Statement of case	1
Facts	1
Argument	7
Conclusion	31

Table of Authorities Cited

Cases	Pages
Adams v. Roberson (Kans.), 155 Pac. 22	19
Ark. v. Tenn., 246 U.S. 158	23
County of St. Clair v. Lovington, 90 U.S. 46	17, 18
Forgeus v. Santa Cruz County (Cal.), 140 Pac. 1092	19
Frank v. Smith (Neb.), 393 N.W. 329, 134 A.L.R. 458.....	20
Gillihan v. Cieleha (Or.), 145 Pac. 1061	20
Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 N.E. 21, 53 A.L.R. 1486	8
Herne v. Smith, 159 U.S. 40	21
Hilt v. Webber, 233 N.W. 159, 31 A.L.R. 1238	22
Jackson v. U. S. (C.C.A. 9th), 56 Fed. (2d) 340	19
McCaskill Company v. United States, 216 U.S. 504	16
Memphis v. Waite (Tenn.), 52 S.W. 161	20
Mitchell v. Smale, 140 U.S. 406	21
Morgan v. Jamestown (R.I.), 80 Atl. 271	20
Oklahoma v. Texas, 268 U.S. 252	19, 23
Re Hutchinson River Parkway Extension, 14 N.Y.S. (2d) 692, affirmed 33 N.E. (2d) 252	20
Re Neptune Avenue (N.Y.), 262 N.Y.S. 679	20
St. Clair County v. Lovington, 23 Wallace 46	19, 27
Shively v. Bowlby, 152 U.S. 35	19, 20
State v. Lakefront, etc. (Ohio), 27 N.E. (2d) 485	20
Tatum v. St. Louis (Mo.), 28 S.W. 1002	20
Whitaker v. McBride, 197 U.S. 510	21

Statutes	Pages
Alaska Compiled Laws Annotated, 1949, Section 2-1-2	19
31 Stat. 552, Section 367	19

Texts	
3 Am. Jur. 593	16
8 Am. Jur. 76	21
53 Am. Jur. 780	8
56 Am. Jur. 891	23
56 Am. Jur. 892	23
56 Am. Jur. 892, note 18	19
56 Am. Jur. 894, note 1	20
56 Am. Jur. 895, note 20	19
56 Am. Jur. 899, note 15e	20
56 Am. Jur. 901, Section 490	19
58 Am. Jur. 897	22
58 Am. Jur. 898	22, 23
Annotation in 58 L.R.A. 194, note 2	23
11 C.J.S. 573, note 79	21

1847

1848

1849

1850

1851

1852

1853

1854

1855

1856

1857

1858

1859

1860

1861

1862

1863

1864

1865

1866

1867

1868

1869

1870

No. 12,356

IN THE
United States Court of Appeals
For the Ninth Circuit

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,

vs.

ALFHELD HJALMAR NORDALE and ARNOLD
MAURITZ NORDALE, Co-trustees of the
Nordale Estate Trust,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

Facts.

The above entitled cause, which is a suit for ejectment, came on for trial on the merits before the Honorable Harry E. Pratt, District Judge for the Territory of Alaska, Fourth Judicial Division, at Fairbanks, Alaska, sitting without a jury, a jury having been expressly waived by agreement of the parties. On the trial of said cause, the Appellees above named were the plaintiffs and the Appellants above named were the defendants.

The Appellees are the owners in "trust" of the legal title of all of Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, Fairbanks Recording District, Fourth Judicial Division, Territory of Alaska, according to the official plat and survey made by L. S. Robe, C.E., in 1909, and the Appellees and their predecessors in interest have been such owners at all times since May, 1903.

The North boundary of said lot in May, 1903, was the south bank of the Chena River which was also the North boundary of the said Fairbanks Townsite at that time, and the said Chena River still continues to be the North boundary of said lot and also the North boundary of the Townsite of Fairbanks at the present time.

Between 1903 and March 13, 1948, land formed by accretion onto the Appellees' North boundary along the said bank of the Chena River, and the river was pushed northward about two hundred feet; said accretion was formed by a gradual and imperceptible deposit by accretion of silt along said river bank, adjacent to the Appellees' lot during the said period of time, namely, from May, 1903, until March 13, 1948, until a piece of dry land between the side lines of said Lot 6 in Block 4 of the said Townsite of Fairbanks, extended northward between the original North boundary of said lot and the present bank of the Chena River, said dry land being the said accretion, is more particularly described as follows, to wit:

Beginning at Corner No. 1, which is the original Northeast corner of Lot 6, as shown on the official

plat of the Town of Fairbanks, being Plaintiffs' Exhibit "F", thence North $11^{\circ} 16'$ W. 235.15 feet, more or less, to the Chena River, being Corner No. 2; thence downstream along the said Chena River a distance of 143.75 feet, more or less, to Corner No. 3; thence South $11^{\circ} 37'$ East 151.76 feet to Corner No. 4, which is also the original Northwest corner of Lot 6 in Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F", thence in an Easterly direction along the original north boundary of said Lot 6, Block 4, as shown by the official map of the Townsite of Fairbanks, being Plaintiffs' Exhibit "F", a distance of 108.05 feet, more or less, to Corner No. 1, the place of beginning.

The Appellants dug three pits in the accretion above described. One of these pits was directly in front of their building and slightly to the right of the entrance, facing the building, as shown by Appellees' Exhibit "G". This pit was approximately four feet wide, six feet long, and approximately six feet in depth. One of the remaining pits was dug approximately ten feet from the southwest corner of the Waxberg and Birklid building, as shown by Exhibit "G", to the south of the building, which pit was approximately two feet in diameter and about three or four feet deep. The third pit was approximately 20 feet from the southwest corner of the said Waxberg and Birklid building, and was a small trench of about two feet in depth. These pits showed that some tin cans and other debris were mixed in with the accre-

tion as it had built up. The amount of such debris was an infinitesimal per cent of the amount of accretion, and no evidence was produced or testimony given to show that the said debris had had any effect upon the forming of the accretion. The evidence clearly showed that the Appellees and their predecessors in interest had known nothing about the deposit of such debris and that it had been done entirely by third persons.

The official survey of the Townsite of Fairbanks, Alaska, as shown by Exhibit "F", shows that the Fairbanks Townsite was bounded by the Chena River on the East and North sides, and that there is a dotted meander line running from point to point on, or close to the bank of the river, and the lots on said meander line are bounded by the dotted line on that one side and by solid lines on the other three sides.

Appellees' Exhibits "A" and "B", being deeds, expressly show that the said Chena River was, and is, the North boundary of said Lot 6 in Block 4, as extended by the said accretion. The said Chena River was the North boundary of said Lot 6 in Block 4, of the Appellees and their predecessors in interest and continued to be such North boundary at all times mentioned in this case; and that all of such land formed by accretion was above the normal high water mark was asserted by all of the parties to this action and was shown by the levels run by the surveyor, and shown on Appellees' Exhibit "G" and also shown by Appellants' Exhibit 4, a portion of a tree growing upon the river bank near the ground in controversy.

The Appellees, who were the Plaintiffs in the Court below, are co-trustees of the Nordale Estate Trust, by virtue of the terms of a declaration of trust executed on the 4th day of November, 1940, under the terms of which declaration of trust, the Appellees were authorized to bring this suit for the protection of the Trust Estate property, which declaration was filed for record in the Recorder's Office of Fairbanks Recording Precinct on December 12, 1940, in Volume 8 of Miscellaneous Records, at page 450, as Document No. 87740. The Appellees were in possession of all of said Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, and of the said accretion as above described, from on or about the 4th day of November, 1940, down to the 13th day of March, 1948, when the Appellants, on the said latter date, unlawfully entered into possession of a portion of said Lot 6 in Block 4, with accretions, which portion is described as follows:

Beginning at Corner No. 1, which is a point 125 feet North $11^{\circ} 16'$ West of the Southeast Corner of Lot 6, Block 4 of the Townsite of Fairbanks, Alaska; thence South $78^{\circ} 44'$ West, 109.26 to Corner No. 2; thence North $11^{\circ} 37'$ West, approximately 105 feet to the present meander line on the South side of the Chena River, which point is Corner No. 3; thence upstream along the present meander line of the South side of the Chena River to Corner No. 4, which is a point at the intersection of the present South meander line of the Chena River and the East side of Lot Six (6), Block 4 extended; thence South $11^{\circ} 16'$ East to Corner 1 and the point of beginning;

and ousted the Appellees therefrom, and ever since then and now, the said Appellants unlawfully withhold the possession of said portion of Lot 6 in Block 4, as extended by accretions, of the Townsite of Fairbanks, Alaska, from the Appellees.

The Appellees demanded of the Appellants the possession of said premises so unlawfully entered upon by the Appellants, and served notice on the Appellants not to trespass upon said premises, but notwithstanding this, the Appellants have refused to deliver possession thereof to the Appellees, and that the said Appellants still refuse to do so.

That after hearing all of the testimony and the evidence produced at the trial, and after hearing the arguments of counsel, the trial Court rendered a verdict in favor of the Appellees.

Subsequently a motion for new trial was made by the Appellants, which motion was argued by counsel, after which it was denied by the trial Court. Thereafter, the said trial Court entered findings of fact and conclusions of law, which findings of fact contained the foregoing facts, and thereupon the said trial Court entered a judgment in accordance therewith, which judgment ordered, adjudged and decreed that the Appellees, as co-trustees of the Nordale Estate Trust, were declared the owners in trust of the legal title and entitled to possession of all of Lot 6 in Block 4 of the Townsite of Fairbanks, Alaska, including the accretions thereto, and likewise ordered, adjudged and decreed that the Plaintiffs have and recover forthwith, of and from the Defendants, and each of them, the

possession of the portion of said Lot 6 in Block 4 now unlawfully held by the Appellants.

It is this judgment upon which this appeal is taken.

ARGUMENT.

I.

The first point which the Appellants have relied on for reversal of the judgment of the District Court is without foundation in fact or in law. The District Court, in its findings, very specifically points out that between 1903 and March 13, 1948, land formed by accretion onto the Appellees' North boundary of Lot 6 in Block 4, along the bank of the Chena River, until the river had pushed northward a considerable distance, and that the said accretion was formed by a gradual and imperceptible deposit by accretion of silt along the river bank adjacent to the Appellees' lot. The trial Court also found that the amount of debris which may have been deposited by third persons was an infinitesimal per cent of the amount of accretion and there was nothing to show that it had had any effect upon the forming of the accretion, and also that the Appellees and their predecessors in interest had known nothing about the deposit of such debris and that it had been done entirely by third persons.

In actions which are tried before a Court, without a jury, the trial Court is entitled to consider all the evidence and to draw therefrom such inferences as are reasonable and proper under the circumstances,

even though another inference, equally reasonable, might also be drawn therefrom. The weight of inferences and of the explanation offered to meet them, is for the determination of the Court, when it is the trier of the facts.

53 *Am. Jur.* 780;

Glowacki v. Northwestern Ohio R. & Power Company (Ohio), 157 NE 21, 53 ALR 1486.

The trial judge, in a trial to the Court without a jury, performs a dual function: he must adopt rules of law for his guidance and find the facts as guided by those rules. He is likewise the judge of the credibility to be given to witnesses who appear before him, and he is not required to accept the testimony of any witness, which he may deem unreliable, although it may be uncontradicted.

53 *Am. Jur.* 780.

It is the contention of the Appellees that the verdict of the trial Court and the findings of fact entered thereon are not contrary to the law and the evidence and are not incredible, but on the other hand, are well supported by the greater weight of the evidence and testimony produced at the trial.

Let us examine the Appellants' contention that their evidence at the trial showed most of the alleged "alluvium" to which the Appellees lay claim, to consist of artificial fill and not to constitute accretion as defined by law.

The only tests made by the Appellants of the character of the soil were demonstrated by three holes

which were dug by them in the area involved. One of these holes was approximately $4\frac{1}{2}$ feet wide, 6 feet long and 6 feet deep, and was dug in front of the building which the appellants had placed on the property in question. The other two holes were dug opposite the southwest corner of the building which the Appellants had placed on the premises, one about 10 feet away from the corner and one about 20 feet away. One of these holes was about 2 feet in diameter and from three to four feet in depth. The other was a narrow trench about 2 feet in depth. The combined area of these holes would probably not exceed forty square feet, and yet there are upwards of fourteen thousand square feet in the entire area now being unlawfully held by the Appellants.

A close examination of Appellants' Exhibits 1, 2 and 3, which are pictures showing the hole dug in front of the Waxberg and Birklid building, and the materials taken from this hole, will show that the most of the material is sedimentary fill as described by the Appellant, Waxberg, in his testimony. (T.R. 231.) As indicated by these pictures, only a small quantity of the material taken from the hole constitutes wood, tin cans, tire rims and an oil drum. This debris is shown to be, and has been, completely surrounded by fine silt or sedimentary fill.

None of the evidence introduced on the trial indicates that any appreciable amount of debris was dumped on the property except in the vicinity of that portion now occupied by the Waxberg and Birklid

building, as shown on the plat introduced in evidence as Appellees' Exhibit "G". So far as the evidence is concerned, all of the remaining portions of the accreted ground were caused by the natural action of the Chena River, both by the migration of the river from the South to the North, and by the subsequent building up of alluvial deposit along the North boundary of said Lot 6 in Block 4 of the Townsite of Fairbanks.

The testimony with respect to the use of this lot goes back as far as 1903 when Carroll and Parker operated a sawmill on the premises. At that time the North boundary of the lot was the Chena River, and the North boundary of the lot has continued to be the Chena River ever since. At that time the lot was 72.85 feet long on the East side and 57.43 feet long on the West side, as shown by Appellees' Exhibit "G". The sawmill mentioned was located on the easterly portion of the lot and occupied most of the lot from North to South. The north end of the sawmill was on the cut bank which extended down to the water line of the Chena River. A steep chute was built from the mill down to the water and extended into the water. The water bordering on the lot and in that vicinity at that time was used as a millpond and there was a natural eddy in the river adjacent to the North boundary of said Lot 6. All of the testimony shows that this eddy began to fill in with silt and sand in 1903 and continued to fill in, forming dry land above the mean high water mark of the Chena River. Fred Parker, Sr., in his testimony testified as follows:

“Q. Did you observe any action of the river on this millpond during time that you operated your sawmill there?

A. We did.

Q. Will you explain what this was?

A. Well, each year the silt kept coming in there and we couldn't hold as many logs as we could the first year.

Q. That silt came in and was deposited by the natural action of the river?

A. Yes sir.

Q. Did you or Mr. Carroll, or anyone else, for that matter, ever dump any dirt or refuse in that millpond?

A. No, sir.” (T.R. 151.)

Mr. Adolph Wehner, who came to Fairbanks, Alaska, in 1905 and has been familiar with the property in question ever since that time, stated in his testimony that the Chena River had changed pretty near altogether and it put all the silt in the area just back of where the sawmill stood and that the Chena River cut away on the North side where the Hospital is, and it filled up on the South side, and that this action of the river had been going on slowly ever since the witness could remember. (T.R. 168 and 169.) Mr. Wehner also testified that since 1905 he had seen a couple of dozen floods that had risen as high as First Avenue and that about six inches of silt had been deposited by every flood and that the flood in the spring of 1948 had deposited about four inches of silt on the playground adjacent to the property in question here. (T.R. 176.)

Mr. Oscar Engstrom testified that he had worked at the sawmill in the year 1904 and that no sawdust or slabs or other debris had ever been dumped into the millpond while he was working there during the fall of 1904. (T. R. 180.)

Mr. Leo Preg, who has been familiar with the property in question ever since 1903, testified that he had worked at the sawmill in 1903 and 1904 and that at no time were any slabs or sawdust ever dumped into the millpond, and that the millpond was kept as clear as possible, and that from the start, the pond was 3½ to 4 feet deep, but it gradually began to fill up with silt that was coming down the river, and that finally it had filled up in 1904 to the point where there was only a foot of water left and the big logs had to be rolled over the muck. (T.R. 188 and 189.) Mr. Preg, who has lived in Fairbanks since 1903, and has spent most of his time here and is thoroughly familiar with the action of the Chena River, forming the North boundary of said Lot 6, further testified that over a period of years, the river had gradually moved from South to North and that the North boundary of Lot 6 had extended by accretions and the action of the river, and nothing else. (T.R. 190.) Mr. Preg further testified that in 1915 the waterfront shown in Appellees' Exhibit "I", correctly described the area and he further stated that the pipe line which appears to be running down to the Chena River along the East line of the property in question, as shown by Appellees' Exhibit "I", had to be extended further down into the water every year and added onto because the South bank of

the Chena River at that point was continually building up and had been since 1903. (T.R. 190, 191 and 192.)

Mr. Waxberg, one of the Appellants, when describing certain materials appearing on Appellants' Exhibit No. 3, said that he thought part of the material was, more or less, a sedimentary deposit, and continued to say over the objection of the Appellees, "*I would say it is almost all sedimentary fill.* However, there is good sized rocks in there that anyone would definitely know couldn't have been floated in there, *and in along with this sedimentary fill*, why, we also found boards and logs and pieces of tin and what have you." (Italics ours.) (T.R. 231.)

Mr. Richard Ragle testified for the Appellants and stated definitely that the channel of the Chena River at the point in question had tended to migrate from South to North. (T.R. 246.) Mr. Ragle further testified that Appellants' Exhibit No. 4 was a section taken from a sapling which he found growing on a little cut bank on the present channel, on property adjacent to the extention of Lot 6 in question here, and that this sapling showed an age of not less than twelve years. (T.R. 252.)

Mr. Richard Rothenberg, who has been a resident of Fairbanks, Alaska, since 1903, and who has been acquainted with the property in question ever since that time, testified for the Appellants and stated positively that the eddy in back of Parker's sawmill was gradually filled in by silt and that the channel moved

out from where the eddy used to be and that this movement had been gradual. He also testified that he noticed that the current was changing and that the channel was moving to the North. (T.R. 273 and 274.)

Mr. Albert Norlin testified for the Appellants and stated that he had worked in a hotel that was located near the property in question from 1920 to 1925, and he stated that the lot in question in this case had filled in some with silt from the river, brought in by the high water, and he stated that the land behind the Vachon building, which sets on the lot in question, was dry except when the water was extremely high and that he had never thrown any refuse on the lot in question. (T.R. 278, 279, 281 and 282.)

Mr. Dave Stanford, who testified for the Appellants, stated that he had lived in Fairbanks since 1911 and has been acquainted with the property since that time. He stated that he had worked for a man by the name of Kehoe, who was in the business of hauling garbage, and that they had dumped garbage occasionally on the property in question during the period of about two or three years. He stated that at no time did they ever dump any garbage in the water. They always dumped it on dry land, above the normal water level of the Chena River. In fact, he stated that when the water was high, they did not dump there at all. (T.R. 288, 289.)

Mr. Charles Main testified for the Appellants and stated that he had resided in Fairbanks since 1904 and that he has been familiar with the property in

question ever since that time. He stated that he remembered the big eddy in back of the Carroll and Parker sawmill which was located on the lot in question in this suit, and that he had seen this eddy fill up with silt, and that it did not take long in high water to make a big silt and that it was settling all the time and filling up the eddy. He stated that he had seen some garbage or refuse dumped on the land back of the Vachon building, being the property in question, but that it was always dumped on dry land. (T.R. 292, 294.)

Mr. Alfheld Hjalmar Nordale, one of the Appellees, who has been familiar with this property for the past 44 years, testified that the Chena River has been cutting away on the North bank of what would be the South boundary of Slaterville, so that where a chicken house and greenhouse formerly stood on the North bank of the river, the channel has now moved over and taken away the ground on which the chicken houses and greenhouses formerly stood. At the same time, the South bank of the Chena River, being the North boundary of the lot in question, has been slowly building up during all of these years. (T.R. 93, 94.) He further testified that the movement of the channel of the river has combined with flood waters in building up the accretions to Lot 6, and that with each flood stage, the receding water would leave a deposit of alluvial soil on the property in question, which has assisted in building up the accretions over the period of years. (T.R. 95, 96.)

The Appellants contend in their Brief that the trial Court failed to take into consideration the Appellants' evidence that the land in question was not an accretion but was formed by "the deposit of waste and debris on the shore." (Page 3 of Appellants' Brief.) It seems to us that here the Appellants beg the question, because if the waste and debris were deposited "on the shore", it would mean that the deposit was being made on land already above the mean high water mark of the Chena River, and therefore it would be on land already formed by accretions. In any event, in a trial by the Court, without a jury, there is a presumption that incompetent evidence was disregarded and the issue determined from a consideration of competent evidence only.

3 *Am. Jur.* 593;

McCaskill Company v. United States (216 U.S. 504).

It must be pointed out, and the Appellants concede, that at least twenty feet had been accreted to the North boundary of Lot 6 by the time the Vachon building was constructed sometime in 1908 or 1909. Appellants say on page 7 of their Brief, "It is only fair to assume that a useable or occupiable portion of that accretion had formed by 1922." If this be true, and certainly the evidence substantiates it, then the rest of the accretion would belong to the upland or riparian owner just as well as the first 20 feet beyond the original North boundary of said Lot 6. It cannot be argued in one breath that part of the accretions which are admitted could belong to the upland owner,

being the Appellees, and not the rest of the accretion, since the entire process of building up has been one of imperceptible growth over a period of more than 45 years.

The fact is that all of the testimony shows that such debris and refuse as was deposited on the property in question was put there after the land was formed and above the mean high water mark of the Chena River. Not a single witness testified that he had dumped any debris there while the ground was under water. Consequently, none of the debris could possibly have affected the accretion, and even assuming, for the sake of argument, that the refuse may have assisted in the further accumulation of dry land above the mean high water mark of the Chena River, this does not constitute new accretion or artificial fill because at no time was any debris dumped into the water.

Counsel make considerable effort to distinguish between artificial causation and artificial fill, and they cite the case of *County of St. Clair v. Lovington*, 90 U.S. 46, as showing that there is a difference. However, they fail to point out that in the Lovington case, the dikes which were built to some extent may have caused some of the accretions, but it can be argued with equal force that the tire rims, oil barrel and other articles of debris found in the hole dug by the Appellants on the land in question in this case, could also have assisted in the building up of alluvial soil by causing some flow of water in and around these obstacles, but the principle is exactly the same. In both instances, they would be merely artificial causa-

tion, because by no stretch of the imagination can it be said that the debris alleged to have been dumped on the Appellees' lot was, in any sense of the word, a complete fill, since their own testimony and evidence shows clearly that the largest portion of material taken from these holes was sedimentary fill. As the Supreme Court said in the *Lovington* case:

“The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of water was natural or affected by artificial means is immaterial. * * * Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not. * * * The question is well settled at common law that the persons whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain. * * * Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. * * * If there be a gradual loss, he must bear it; if a gradual gain, it is his.” (*County of St. Clair v. Lovington*, 90 U.S., page 46, pages 66, 67, 68 and 69.)

By Act approved June 6, 1900, Congress, in making laws for the government of Alaska, provided that "So much of the common law as is applicable to and not inconsistent with the Constitution of the United States, or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska". 31 Stat. 552, Sec. 367; Sec. 2-1-2, Alaska Compiled Laws Annotated, 1949. This section was amended in 1933 subjecting the common law to acts passed by the Territorial Legislature, but otherwise it remains unchanged today.

The great weight of authority is that the law respecting the acquisition of title by accretion is independent of the law respecting the title to soil covered by water. *Shively v. Bowlby*, 152 U.S. 35.

At common law the riparian owner acquires title to additions thereto by accretion. *Oklahoma v. Texas*, 268 U.S. 252-256; 56 *Am. Jur.* 892, Note 18; page 901, Sec. 490; page 895, Note 20.

Even if Appellants had shown that debris had been deposited artificially in such quantities as to increase the deposit by accretion, it would nevertheless have been immaterial as the riparian owners had no part in making the artificial deposits.

St. Clair County v. Lovington, 23 Wallace 46-66;

Jackson v. U.S. (C.C.A. 9th), 56 Fed. (2d) 340;
Forgeus v. Santa Cruz County (Cal.) 140 Pac. 1092;

Adams v. Roberson (Kans.), 155 Pac. 22;

Tatum v. St. Louis (Mo.), 28 S.W. 1002;
Frank v. Smith (Neb.), 393 N.W. 329; 134
 A.L.R. 458-468;
Re Neptune Avenue (N.Y.), 262 N.Y.S. 679;
Re Hutchinson River Parkway Extension, 14
 N.Y.S. (2d) 692. Affirmed 33 N.E. (2d) 252;
State v. Lakefront, etc. (Ohio), 27 N.E. (2d)
 485;
Gillihan v. Cieleha (Or.), 145 Pac. 1061;
Morgan v. Jamestown (R.I.), 80 Atl. 271;
Memphis v. Waite (Tenn.), 52 S.W. 161;
 56 *Am. Jur.*, page 899, Note 15e; page 894,
 Note 1.

The Appellants do not admit that the South bank of the Chena River was the boundary of the Townsite of Fairbanks, and of Appellees' lot, afterwards shown by the Official Survey of L. S. Robe in 1909, and the plat thereof, to be Lot 6 in Block 4 of the Fairbanks Townsite, Alaska. This map, Appellees' Exhibit "F", shows the Fairbanks Townsite to be bounded by the Chena River on the East and North sides. There is a dotted meander line running from point to point on or close to the bank of the river, and the lots on said meander line are bounded by the dotted line on that one side, and solid lines on the other three sides.

The rule is quoted from 7 Wall. 287 in *Shively v. Bowlby*, 152 U.S. 39:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the

banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the meander line as actually run on the land, is the boundary."

In *Whitaker v. McBride*, 197 U.S. 510-512, it is stated:

"A meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser."

To the same effect are:

8 *Am. Jur.* 76;

11 *C.J.S.* 573, Note 79.

The water and not the meander line is the boundary. *Herne v. Smith*, 159 U.S. 40, 42, in which the Court said:

"The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line, * * *".

In *Mitchell v. Smale*, 140 U.S. 406, the Court held, as to a non-navigable lake, page 414:

"It has been decided again and again that the meander line is not a boundary, but that the body

of water whose margin is meandered is the true boundary."

In *Hilt v. Webber*, 233 N.W. 159; 31 A.L.R. 1238, it was held that the boundary line of riparian owners along the Great Lakes is the waters' edge, and not the meander line. The riparian owner has the right to accretion.

In order to effect a change of boundary, formations resulting from accretion or reliction must not only be made to the contiguous land, but must operate to produce an expansion of the shore line outward from the tract to which they adhere. One of the prime requisites of an alluvial formation or deposit, in order to give title thereto to the owner of the land to which it is attached, is that it be made gradually and imperceptibly. The word imperceptibly as used in this rule means the accretion is imperceptible in its progress, although it may be perceptible after a long lapse of time. As stated in some cases, the test as to what is gradual and imperceptible in the sense of the rule is that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. According to some authorities, it is not necessary that the formation be one in discernment by comparison at two distinct points of time, but it has been said that the length of time during formation is not material if the increment added is utterly beyond the power of identification.

58 *Am. Jur.* 897 and 898.

That the area of riparian property has more than doubled in extent by accretions made during more than

40 years is not so great an increase as to forbid the idea that it was imperceptible.

58 *Am. Jur.* 898;

Note 2, Anno. 58 *L.R.A.* 194.

Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. The term "alluvion" is applied to the deposit itself, while accretion denotes the act; however, the terms are frequently used synonymously.

56 *Am. Jur.* 891.

It is a general rule that where the location of the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of riparian land thus acquires title to all additions thereto or extensions thereof by such means and in such manner and loses title to such portions as are so worn or washed away or encroached upon by water.

56 *Am. Jur.* 892;

Oklahoma v. Texas, 268 U.S. 252;

Ark. v. Tenn., 246 U.S. 158.

Appellants admit that the action of the Chena River deposited silt along the shore lying in front of the Appellees' land, but they argue that this deposit has been considerably accelerated by the use of the shores

as a dump yard. (Page 4 of Appellants' Brief.) There is no evidence to indicate this or to support this argument. However, even if there were such evidence, it would not change the rule as announced in *County of St. Clair v. Lovington*, supra.

There is no testimony supporting the statement that the hole dug by the Appellants in front of their building was well below the original mean high water level of the Chena River. The levels taken by the witness, Linck, indicate that there was a gradual slope from the South end of the lot to the river and that the sapling which was found in the vicinity of the property in question by the witness, Ragle, and from which Appellants' Exhibit 4 was taken, was growing 12 feet above the low water mark and on about the high water mark, making it at least 6 feet above the mean high water mark of the Chena River. (T.R. 253.) This point is well below the bottom of the hole dug by the Appellants.

The Appellants argue that the witness, Ragle's, testimony shows that the material found in the test pits was not deposited by any natural agency and yet the witness, Ragle, positively testified that the Chena River had migrated from South to North (T.R. 246), causing dry land to appear by natural action of the river, and all of the debris found in the test pits referred to was deposited on the land after it had become dry and above the mean high water mark of the Chena River.

The Appellants argue that the Appellees are not entitled to the accretion because they have failed to im-

prove it. There might be some force to this argument if the basis for the Appellees' claim was laid on the theory of adverse possession. However, this rule is not applicable since the Appellees' claim is based entirely on the law of accretion and as that of a riparian owner, and as such, it is not incumbent on the Appellees to maintain or improve their land in any way whatsoever. Being the owners of the fee simple title to the accretion, Appellees may use the land as they see fit and improve it or not, as they see fit.

The Appellants also answer their own argument by admitting on page 7 of their Brief that a usable or occupiable portion of the accretion had formed by 1922 and had been occupied by a building built on the premises and known as the Vachon building ever since 1908 or 1909, so that if the Appellees were attempting to assert their title on the basis of adverse possession, they would be without authority because adverse possession would not hold against the United States Government; but by reason of the fact that the Appellants admit that the Appellees are entitled to the accretions of more than 20 feet beyond the original North boundary of the lot, they cannot now be heard to argue that the title to the remaining portion of the accretions vests in the Federal Government. Furthermore, this question is not within the issues raised by the pleadings.

Appellants seem to think that there was some uncertainty in the mind of the trial Court in his findings of fact. However, an examination of these findings discloses no uncertainty whatsoever, and an examination

of the record amply discloses that the findings of fact were justified by an overwhelming preponderance of evidence.

The Appellants concede that the Appellees had no knowledge of the deposits of the debris on the premises. Appellants further concede that these deposits were made entirely by third persons. However, they do not seem to agree with the law applicable to such cases, notwithstanding the fact that many courts from the United States Supreme Court on down have held that if the artificial fill is made by third persons or trespassers, the law of accretions still holds and the riparian owner is entitled to the same.

Many of the cases cited in Appellants' Brief are not particularly applicable since they apply to instances where land was reclaimed by man through filling in land once water and making it dry, and filling up land under navigable water and thereby raising it above water, thus making it dry. These instances do not apply to the case at bar for the simple reason that all of the testimony shows that all of the debris dumped on the land in question was never dumped into the water but was always dumped on dry land, leaving it definite and certain that the accretion had formed prior to the time when the debris had been dumped upon the land and consequently could have had no effect whatever on the original formation of the accretions and only may have enhanced the continued building up of the dry land.

It may be beyond the Appellants' discernment to conceive how the upland owners factual unawareness

can convert artificial fill into accretion were such the case, but the lack of discernment on the part of the Appellants cannot change the law or the evidence, and whether or not a state of mind can encourage civic beautification is a question which might better be taken up with the mayor and the city council and not with this court.

The Appellants state on page 13 of their Brief that the title to the Chena River bed to high water mark must be assumed to be in the United States Government. There is no basis in law or in fact for this statement and it is difficult to understand upon what theory the Appellants endeavor to make such a claim. The Appellants further argue that the interest of the United States Government is presented by the record and quote certain portions of the record in a futile attempt to substantiate this position, but this is entirely outside the record and the law. The location notice referred to is not in evidence and was not part of the issues joined, and furthermore, the Appellees' right to the accretions is not based upon adverse possession as has been pointed out previously. They are based upon title in fee simple under the general law of accretions, the riparian right to future alluvion being a vested right. (*County of St. Clair v. Lovington*, supra.)

The argument set forth on page 15 of Appellants' Brief with regard to accessibility to the waterfront does not make sense because the upland owners, the Appellees, have always had accessibility to the Chena

River by reason of owning the fee simple title to the accretions as well as to the original portion of Lot 6.

The inescapable conclusion so far as the first point of the Appellants' Brief is concerned is they have wholly failed to advance any substantiating theory or proof that is sufficient to disturb the findings of fact or the judgment as entered by the trial Court.

II.

The second point relied upon for reversal by the Appellants is equally without merit. They attempt to argue that the Appellees have not sustained the burden of proof that the disputed land was formed by accretions as defined by law. All of the evidence quoted above and the entire record substantiates this without question, and for the Appellants to argue that an examination of the Appellees' evidence, giving it its full weight, reveals that it fell short of sustaining the burden of proof is merely wishful thinking on the part of the Appellants. They go on to state on page 18 of their Brief that the Appellees' first witness, A. H. Nordale, testified that the upland was flooded once or twice a year, leaving some alluvial deposit and that over a period of years the disputed premises were building up, but they point out that Mr. Nordale did not say how much alluvial deposit was left after each flood. However, the witness, Wehner, did testify on cross examination as to how much deposit was left after each flood and showed that over the period of

years that he has known the property, on the basis of his estimates, more than twelve feet of alluvial deposit has built up since 1905. (T.R. 176.)

Appellants further argue that the testimony of the witness, Fred Parker, Sr., must be considered largely a conclusion; however, they fail to point out his testimony was not shaken on cross examination, and there has been no testimony introduced contradicting him in any way, and more than 20 feet of accretion had been added to the lot by the time the Vachon building was constructed, showing clearly that Parker's testimony was fact and not fiction.

On page 20 the Appellants argue that the fact that the premises were built up by the deposit of silt is largely a conclusion. It might equally be argued that it is as much of a conclusion to assume that the land was built up by artificial means, because all of the testimony shows that the debris which was dumped on the premises was dumped on dry land, whereas the filling in of the millpond began as far back as 1903 and the gradual and imperceptible accretion continued from year to year since, and still continues, as shown by the evidence that in the flood of 1948 two and one half inches of sedimentary deposit was found on a concrete foundation of the Waxberg-Birklid building by the photographer, Griffin, who took the four pictures introduced in evidence by the Appellees as Exhibits "J", "K", "L" and "M", showing the flood conditions at that time. The Appellants attempted to discredit this testimony by showing that there was little or no sedimentary deposit when they examined

the premises the next year. However, they failed to point out that during the winter the ground had been covered with a large amount of snow which had melted in the spring and drained off, which could account for the fact that there was no evidence of sedimentary deposit left by the flood of 1948 at that time. However, the pictures introduced in evidence by the Appellees definitely contradict the Appellants' story.

They make much ado about the fact that only one quarter inch of sedimentary deposit was left on the floor of their building after the flood of 1948. However, it should be pointed out that the building only had sixteen inches of water in it and that it was much higher than the surface of the ground and naturally, when the water receded, only a small portion of the sedimentary residue would be left in the building.

It is difficult to see how any more could be produced by way of proof than is disclosed by the record substantiating the fact that the accretions to the Appellees' land were formed by the natural action of the Chena River over a period of more than 45 years. If the testimony as disclosed by the record is not sufficient to establish this fact, then by no stretch of the imagination could a case of this kind ever be proved.

CONCLUSION.

The Appellees respectfully submit that the entire argument of the Appellants is a futile attempt to pull the cerulean veil across the eyes of this court. However, we feel sure that this court will view the evidence and law in this case through the clear vision of logic and the bright eye of reason, and by so doing, will reach the inescapable conclusion that the trial court was entirely correct in its findings and that the accretions formed on the North boundary of Lot Number 6 in Block Number 4 of the Townsite of Fairbanks was the result of the gradual deposit, by the water of the Chena River, of solid material, consisting of mud, sand and sediment, so as to cause that to become dry land which was theretofore covered by water, and that the boundary of the original Lot 6 of Block 4 was gradually and imperceptibly changed by the said accretion and that, therefore, the Appellees, as owners of the riparian land, have thus acquired title to all the additions thereto, and that the Appellants are trespassers thereon and unlawfully withhold the said accretions from the Appellees, by reason of which the Judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, entered in this cause should be affirmed.

Dated, Fairbanks, Alaska,
February 17, 1950.

Respectfully submitted,

MAURICE T. JOHNSON,

Attorney for Appellees.

No. 12360

**United States
Court of Appeals**
For the Ninth Circuit.

**GLENN O. PRICKETT, H. F. WINANS and
S. E. WHITNEY, on behalf of themselves
and other employees similarly situated,**
Appellants,

vs.

**CONSOLIDATED LIQUIDATING CORPORA-
TION,**
Appellee.

Transcript of Record

**Appeals from the United States District Court,
Southern District of California,
Central Division.**

FILED

NOV 25 1949

PAUL P O'BRIEN CLERK

No. 12360

**United States
Court of Appeals
For the Ninth Circuit.**

**GLENN O. PRICKETT, H. F. WINANS and
S. E. WHITNEY, on behalf of themselves
and other employees similarly situated,
Appellants,
vs.**

**CONSOLIDATED LIQUIDATING CORPORA-
TION,
Appellee.**

Transcript of Record

**Appeals from the United States District Court,
Southern District of California,
Central Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Amended Complaint for Wages and Liquidated Damages Due Under the Fair Labor Stand- ards Act of 1938.....	20
Exhibit 1—Consent to Become Party Plain- tiff, Charles R. Cobb.....	24
2—Consent to Become Party Plain- tiff, Frank Hemminger.....	24
3—Consent to Become Party Plain- tiff, Fred M. Koehler.....	25
4—Consent to Become Party Plain- tiff, Oliver H. Raftery.....	25
5—Consent to Become Party Plain- tiff, Charles E. Smith-Sanford.	25
6—Consent to Become Party Plain- tiff, Harry Sortors.....	26
7—Consent to Become Party Plain- tiff, Luther M. Walters.....	26
Answer to Complaint.....	14
Bill of Particulars.....	11
Certificate of Clerk.....	42

INDEX	PAGE
Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938	2
Designation of Record on Appeal.....	40
Designation of Record to Be Printed on Ap- peal	45
Minute Order March 7, 1949.....	19
Minute Order May 12, 1947.....	10
Minute Order May 23, 1949.....	35
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	36, 40
Notice of Motions: To Dismiss Action to Strike Matter for More Definite Statement and Bill of Particulars.....	5
Notice of Motions: To Dismiss Amended Com- plaint, to Dismiss Claims of Certain Claim- ants, to Strike Certain Matter, for a More Definite Statement.....	30
Order of Dismissal as to Certain Plaintiffs...	38
Pre-Trial Stipulation of Facts and Statement of Issues.....	27
Statement of Points on Appeal.....	44
Stipulation to Extend Time to File Record and Docket Appeal and Order Granting Time..	37
Stipulation Re Clerk's Record on Appeal and Waiver	42

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

MOHR and BORSTEIN,
PERRY BERTRAM,
412 W. 6th St.,
Los Angeles 14, Calif.

For Appellee:

ALFRED WRIGHT,
HAROLD F. COLLINS,
621 S. Spring St.,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 6274-PH

GLENN O. PRICKETT, H. F. WINANS and S.
E. WHITNEY, on behalf of themselves and
other employees similarly situated,
Plaintiffs,

vs.

CONSOLIDATED STEEL CORPORATION,
LTD., a corporation,
Defendant.

COMPLAINT FOR WAGES AND LIQUIDATED
DAMAGES DUE UNDER THE
FAIR LABOR STANDARDS ACT OF 1938

By way of complaint, plaintiffs complain and
allege, as follows:

I.

Plaintiffs bring this action on behalf of themselves and all other employees similarly situated, pursuant to Sec. 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C. Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorneys' fees.

II.

Jurisdiction of this action is conferred upon the Court by [2] Sec. 16 (b) of the Act and by Sec. 24 (8) of the Judicial Code (28 U.S.C. Sec. 41 (8)).

III.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, state of California, within the jurisdiction of this Court.

IV.

At all times herein mentioned, defendant was engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

V.

Within three years last past, defendant employed the plaintiffs and the other employees similarly situated, on behalf of whom this action is brought, at its said place of business, as maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, toolroom attendants, toolroom mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities.

VI.

During the respective periods of employment by the defendant, as aforesaid, plaintiffs and said other employees similarly situated, were compensated at various hourly rates, the precise period of employment and hourly rates at which plaintiffs and each such employees were employed are contained in the

books and records of the defendant, and are not known to the plaintiffs at the present time. In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours or more, for forty (40) hours of which they were paid at straight time, and for [3] all hours in excess of forty (40) hours, they were paid at the rate of time and one-half. In addition to said forty-eight (48) hours or more for which they were credited and paid, the plaintiffs and said other employees similarly situated worked one-half ($\frac{1}{2}$) hour each day, or three (3) hours or more each week, for which they were not credited and for which they received no compensation whatsoever.

VII.

There is now due, owing and unpaid, from the defendant to the plaintiffs, and to each of the employees similarly situated, on behalf of whom this action is brought, a sum equal to one and one-half times the regular rate at which each such employee was employed, and for which he was compensated, times three (3) or more hours for each week of his employment by the defendant, and for which he was not paid, plus an equal amount as liquidated damages.

VIII.

Section 16 (b) of the Act provides that the Court in this action shall, in addition to any judgment

awarded to plaintiffs, allow a reasonable attorneys' fee to be paid, by the defendant.

Wherefore, plaintiffs pray judgment against the defendant and in favor of the plaintiffs and each of the employees similarly situated, on behalf of whom this action is brought, in a sum equal to one and one-half times the regular rate at which each such employee was employed, times three (3) or more hours for which he was not paid in each week of his employment by the defendant, plus an equal amount as liquidated damages, plus attorneys' fees for services rendered herein, and for costs of suit and all proper relief.

MOHR AND BORSTEIN,

By /s/ ALFRED J. BORSTEIN,
Attorneys for Plaintiffs.

[Stamped]: Complaint amended: 1st date: April 6, 1949.

[Endorsed]: Filed Jan. 16, 1947. [4]

[Title of District Court and Cause.]

NOTICE OF MOTIONS: TO DISMISS ACTION
TO STRIKE MATTER FOR MORE DEFINITE
STATEMENT AND BILL OF PARTICULARS

To the Plaintiffs Herein and to Their Attorneys,
Mohr and Borstein:

Please Take Notice that on Monday, May 12, 1947,

at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard in Court Room No. 3, of United States District Judge Peirson M. Hall, located in the United States Post Office and Court House at Los Angeles, California, the defendant, Consolidated Steel Corporation, by and through its attorneys, will present motions for orders and relief as follows:

I.

To dismiss the pending action in its entirety.

Said motion will be urged upon the ground that the Complaint herein fails to state any claim upon which relief can be granted against the defendant.

II.

To dismiss the pending action as to all unnamed and [5] unidentified claimants in whose behalf plaintiffs assert the right to bring and maintain said action, which claimants are indeminately referred to in the Complaint herein (Paragraphs I, V, VI and VII) as "other employees similarly situated," unless each of said claimants shall intervene or otherwise become a party of record in said action, or shall designate an agent or representative to maintain said action in his behalf within a reasonable period of time to be fixed by the court herein.

Said motion will be urged upon the ground that unnamed and unidentified claimants have no status as parties to said action, and upon the further ground that plaintiffs have no right to bring or

maintain said action in behalf of unnamed and unidentified claimants.

III.

To strike matters stated and alleged in the Complaint as follows:

1. The words "and all other employees similarly situated," in Paragraph I, page 1, lines 25 and 26.

2. The words "and all other employees similarly situated," in Paragraph V, page 2 line 16.

3. The words "and all other employees similarly situated," in Paragraph VI, page 2, lines 24, 25 and 30; page 3, lines 3 and 4.

4. The words "and each such employees," in Paragraph VI, page 2, lines 26 and 27.

5. The words "and to each of the employees similarly situated," in Paragraph VII, page 3, line 10.

6. The words "and each of the employees similarly [6] situated," in the Prayer, page 3, lines 22 and 23.

IV.

To require plaintiffs to furnish more definite statements and a bill of particulars respecting matters, severally, as follows:

1. As to each plaintiff and claimant, a statement describing the exact nature of the work, labor or other services performed.

2. A detailed statement relative to the "one-half ($\frac{1}{2}$) hour each day, or three (3) hours or more each week" worked by the several claimants "for which

they were not credited and for which they received no compensation whatsoever'' as alleged in Paragraph VI of the Complaint, which statement shall specify:

(a) The exact nature of work performed by each claimant during said one-half ($1/2$) hour period each day.

(b) Whether the alleged work was performed prior to the commencement of or subsequent to the termination of the regularly established shift or hours of employment of each claimant or preceding, during or subsequent to any lunch, rest or recreational period or otherwise.

(c) Whether the one-half ($1/2$) hour period each day for which compensation is claimed, includes any effort expended or interval of time devoted to travel to or from or within defendant's plant or place of business; and if so, the [7] number of minutes expended in each such act of travel.

(d) Whether the defendant ordered, instructed, notified or in any other manner required or directed claimants or any of them to expend, devote or apply said one-half ($1/2$) hour each day to specified duties, services, occupations, assignments or efforts; and if so, the time, place, and manner of performance thereof, and if so, the name and official position of the employee, representative or officer of defendant who initiated or enforced such requirement.

3. A detailed statement as to all claimants referred to in the Complaint (Paragraph I, page 1) as

“all other employees similarly situated,” showing with respect to each such claimant:

- (a) claimant's name;
- (b) job classification;
- (c) nature of duties performed;
- (d) period of employment by defendant; and
- (e) the date, form, and nature of every authorization under which any of the plaintiffs assert the right to represent each such claimant in the pending action.

Said motion will be urged upon the ground that defendant requires the designated [8] information in order to prepare its defense herein.

The foregoing motions will be based upon the pleadings and records herein, and defendant will rely upon the Memorandum of Points and Authorities filed herewith.

Dated: April 11, 1947.

ALFRED WRIGHT and

HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,

Attorneys for Defendant

Consolidated Steel Corporation.

[Endorsed]: Filed April 11, 1947. [9]

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 12th day of May in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable: Peirson M. Hall,
District Judge.

[Title of Cause.]

No. 6274-PH Civil

GLEN O. PRICKETT, et al.,

Plaintiffs,

vs.

CONSOLIDATED STEEP CORP., LTD.,

Defendant.

This cause coming on for hearing on motion of the defendants to dismiss, to strike, for more definite statement, or for a Bill of Particulars, pursuant to notice thereof filed April 11, 1947; Messrs Mohr and Borstein by Alfred J. Borstein, Esq., appearing as counsel for the plaintiffs; Harold Collins, Esq., appearing as counsel for the defendant; counsel for plaintiff states he is willing to grant a Bill of Particulars, whereup motion for Bill of Particulars is granted and all other motions are stricken from the calendar. [16]

[Title of District Court and Cause.]

BILL OF PARTICULARS

To the Defendant, Consolidated Steel Corporation,
Ltd., and to Their Attorney:

The following is the Bill of Particulars demanded
by you:

The names of the plaintiffs and the other claim-
ants similarly situated to them, together with job
classification of each of them, and their approximate
dates of employment at the Consolidated Steel Cor-
poration, Ltd., are:

Name	Job Classification	Approx. Dates of Employment
Glen O. Prickett:	Maintenance Electrician	
(Sub Station Operator)	.....	May 5, 1943, to November 29, 1946
H. F. Winans:	Maintenance Electrician	
(Sub Station Operator)	.....	March 23, 1942, to May 3, 1946
	S. E. Whitney: Maintenance Electrician	
(Sub Station Operator)	.....	January 19, 1945, to June 30, 1946
Harry O. Sortors:	Maintenance Electrician (Lead-	
man of Sub-Stations)	Operating Engineer, Sta-	
tionary Engineer	.....	June 30, 1941, to January 14, 1946
Luther M. Walters:	Stationary Engineer (Butane,	
Oxygen and Acetylene Plants)	.....	November 22, 1943, to August, 1946
Samuel D. Tinker:	Stationary Engineer (Acety-	
lene, Oxygen, Propane Plants)	and Compressor	
House Operator	.....	December 6, 1942, to November, 1945
Frank Hemminger:	Maintenance Electrician (Sub-	
Station Operator)	.....	June 1, 1941, to June 25, 1946
Oliver H. Raftery:	Maintenance Electrician (Sub-	
Station Operator)	.....	June 16, 1942, to April, 1946
Fred M. Koehler:	Maintenance Electrician (Sub-	
Station Operator)	.....	March 6, 1942, to March 4, 1946
Charles R. Cobb:	Maintenance Electrician	
(Sub-Station Operator) (Leadman Sub-		
Stations)	.....	January 15, 1942, to July 25, 1946
Charles E. Smith-Sanford:	Maintenance	
Electrician (Sub-Station Operator)	.....	July, 1941, to August, 1945

The one-half ($\frac{1}{2}$) hour each day that each and every person above named worked, as alleged in the complaint, occurred during his respective lunch periods, during which time he could not leave his post or station, but was required to perform work and services during said period of time the same as during the other periods of his shift. [18]

The nature of the work performed and the duties of each claimant are as follows:

*Name**Duties*

Glen C. Prickett—Operated Sub-Station at all times during his shift, including the lunch period. Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

H. F. Winans—Operated Sub-Station at all times during his shift, including the lunch period. Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

S. E. Whitney—Operated a Sub-Station at all times during his shift, including the lunch period. Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

Harry O. Sortors—Leadman in charge of Sub-Stations, handled electrical switching, stood by at Sub-Stations and for a one-year period was a motion picture projectionist. All of said work having been performed during his lunch period. He worked $8\frac{1}{2}$ hours per day and was paid for 8 hours.

Luther M. Walters—Operated the Butane, Oxygen and Acetylene Plants during his shift, includ-

ing the lunch period. Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

Samuel D. Tinker—Operated Acetylene Plant, Oxygen Plant and Propane Plant, and Compressor House. Operated all the equipment at said plants, maintaining said equipment, and standing by at all times during his shift, including the lunch period. Worked $8\frac{1}{2}$ hours per day, was paid for 8 hours.

Frank Hemminger—Operated Sub-Station at all times during his shift including the lunch period. Worked $8\frac{1}{2}$ hours per day and was paid for 8 hours. [19]

Oliver H. Raftery—Operated Sub-Stations, crane maintenance, maintenance electrician on the ways, and performed this work during his shift, including the lunch period; worked $8\frac{1}{2}$ hours per day and was paid for 8 hours.

Fred M. Koehler—Operated Sub-Station at all times during his shift including the lunch period. Worked $8\frac{1}{2}$ hours per day and was paid for 8 hours.

Charles R. Cobb—Operated a Sub-Station and was also a lead-man in charge of Sub-Station Operators. Worked at all times during his shift, including his lunch period. Worked $8\frac{1}{2}$ hours per day; was paid for 8 hours.

Charles E. Smith-Sanford—Operated a Sub-Station at all times during his shift, including the lunch period. Worked $8\frac{1}{2}$ hours per day, and was paid for 8 hours.

The orders under which the claimants were required to stay at their posts during their lunchtime period, were issued by Vern D. Elliott, General Electrical Superintendent of the yard, and relayed to all supervisory personnel under him; the requirements that the above named persons remain at their post during their lunch period was necessarily required due to the nature of their duties and the character and type of the equipment which they were required to maintain.

Dated: May 29, 1947.

MOHR AND BORSTEIN,
By /s/ ALFRED J. BORSTEIN,
Attorneys for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed June 5, 1947. [20]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Consolidated Steel Corporation, hereinafter referred to as the defendant, for its answer to the Complaint on file herein admits, denies and alleges as follows:

I.

Referring to paragraphs I, II and VIII of the Complaint, defendant neither admits nor denies the allegations made therein as to the jurisdiction of the court, for the reason that said allegations constitute statements and conclusions of law and do not constitute statements of facts.

II.

Referring to Paragraph III of the Complaint, defendant admits the allegations made therein. In connection therewith, defendant alleges that its corporate name formerly was Consolidated Steel Corporation, Ltd., but that said name has been changed to [22] and now is Consolidated Steel Corporation.

III.

Referring to Paragraph IV of the Complaint, defendant denies every allegation made therein, except as hereinafter admitted or otherwise alleged. Defendant admits that between July 1, 1942, and August 31, 1946, approximately, defendant engaged in the construction, fabrication and repair of ships and vessels within Los Angeles County, California, pursuant to contracts and commitments with the government of the United States of America and its departments and agencies, including United States Maritime Commission and United States Navy. Defendant denies that said activities constituted engagement in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

IV.

Referring to Paragraph V of the Complaint, defendant admits that for varying periods of time within three years prior to the commencement of the pending action defendant employed the several plaintiffs named in the Complaint and the several additional claimants named in the Bill of Par-

ticulars heretofore filed in the pending action. Defendant denies that said plaintiffs and claimants were continuously so employed during or throughout said three-year period, or that they were employed in the respective job classifications, or that they performed the respective duties stated in Paragraph V of the Complaint or in said Bill of Particulars.

V.

Referring to Paragraph VI of the Complaint, defendant denies every allegation made therein, except as hereinafter admitted or otherwise alleged. Defendant alleges that each and all of the plaintiffs and claimants named in said Bill of Particulars have been fully credited, allowed and compensated for all hours [23] that they worked for defendant during said period, and that they have been compensated and paid at hourly rates of compensation in excess of the minimum rates prescribed in said Act, and they have been compensated and paid at least one and one-half times their respective hourly rates of compensation for all hours in excess of forty hours a week which they may have worked in any work week during said period.

VI.

Referring to Paragraph VII of the Complaint, defendant denies every allegation made therein. Defendant alleges that the failure on its part to pay any claimant herein the amount of compensation to which any such claimant may have been entitled to receive, (if the court finds that there was such a

failure) was not the result of deliberate, wilful or neglectful action on the part of defendant, but was the result of actions and procedures pursued in good faith by defendant.

For a First Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

Defendant alleges that the services and activities, if any, performed by the plaintiffs and claimants as generally described in the Complaint and further particularized in said Bill of Particulars were not rendered or performed pursuant to any written or unwritten contract or any custom or practice in effect at the time of the performance of said alleged services and activities, between defendant and said plaintiffs and claimants or their agents or collective bargaining representatives.

For a Second Affirmative Defense to the Complaint herein, defendant alleges as follows: [24]

I.

The claims of all the plaintiffs and claimants named in said Bill of Particulars, other than those named in the Complaint on file herein, to wit Glenn O. Prickett, H. F. Winans and S. E. Whitney, for alleged unpaid compensation earned prior to June 5, 1945, are barred by Sections 6, 7 and 8 of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Congress, 1st Session).

For a Third Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

Defendant alleges that the failure, if any, on the part of defendant to compensate the several plaintiffs and claimants herein for services and activities performed by them during their respective lunch periods, as described in said Complaint and Bill of Particulars, was not the result of any wilful or deliberate failure or refusal on the part of defendant to compensate said claimants for their services, but said failure, if any, was the result of actions and procedures pursued in good faith by defendant, and that for said reason the court should not award said claimants liquidated damages herein.

For a Fourth Affirmative Defense to the Complaint herein, defendant alleges as follows:

I.

The court does not have jurisdiction of the subject matter of the pending action.

Wherefore, defendant prays that the Complaint herein be dismissed, that defendant have judgment for its costs and for such other relief as to the court seems proper.

ALFRED WRIGHT and
HAROLD F. COLLINS,
By /s/ HAROLD F. COLLINS,
Attorneys for Defendant. [25]

State of California,
County of Los Angeles—ss.

John M. Robinson, Jr., being first duly sworn,
deposes and says:

That he is Secretary of Consolidated Steel Cor-

poration, a corporation, Defendant in the above entitled action, and as such officer he is duly authorized to and does make this verification for and on behalf of said corporation; that he has read the foregoing Answer of Defendants and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to such matters, that he believes them to be true.

/s/ JOHN M. ROBINSON, JR.

Subscribed and sworn to before me this 11th day of June, 1947.

[Seal] /s/ EDNA R. WINTER,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed June 16, 1947.

At a stated term, to wit: The February Term, A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of March in the year of our Lord one thousand nine hundred and forty-nine.
Present: The Honorable: Peirson M. Hall,
District Judge.

[Title of Cause.]

For pre-trial hearing; Perry Bertram, Esq., appearing as counsel for plaintiffs; Harold Collins, Esq., appearing as counsel for defendant;

Attorney Collins states he consents to the filing of an amended complaint reserving all rights and defenses under pleadings.

On motion of Attorney Bertram, it is ordered that plaintiff is granted 30 days to amend under the jurisdictional requirement under the Portal-to-Portal Act, and allowing defendant 30 days to answer amended complaint. [28]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR WAGES AND
LIQUIDATED DAMAGES DUE UNDER
THE FAIR LABOR STANDARDS ACT OF
1938

By way of complaint, plaintiffs complain and alleges, as follows:

I.

Plaintiffs bring this action on behalf of themselves and all other employees similarly situated, pursuant to Sec. 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C. Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorneys' fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16 (b) of the Act and by Sec. 24 (8) of the Judicial Code (28 U.S.C. Sec. 41 (8)). [29]

III.

The other employees similarly situated and on behalf of whom this action is brought are: Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R. Cobb, Charles E. Smith-Sanford. Each of those employees have consented in writing to become parties to this action, their written consents being attached hereto as Exhibits one through seven inclusive and by this reference made a part hereof.

IV.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

V.

At all times herein mentioned, defendant was engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

VI.

Within three years last past, defendant employed the plaintiffs and the other employees similarly

situated, on behalf of whom this action is brought, at its said place of business, as maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, toolroom attendants, toolroom mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities. [30]

VII.

During the respective periods of employment by the defendant, as aforesaid, plaintiffs and said other employees similarly situated, were compensated at various hourly rates, the precise period of employment and hourly rates at which plaintiffs and each such employees were employed are contained in the books and records of the defendant, and are not known to the plaintiffs at the present time. In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours or more, while employed on the day shift, with having worked forty-five (45) hours or more while on the swing shift, and with having worked forty-two (42) hours or more while employed on the grave-yard shift, for forty (40) hours of which they were paid at straight time, and for all hours for which they were credited in excess of forty (40) hours, they were paid at the rate of time and one-half. In addition to said hours for which they were credited and paid, the plaintiffs and said other employees similarly situated worked one-half ($\frac{1}{2}$) hour each day, or three (3) hours or more each

week, for which they were not credited and for which they received no compensation whatsoever.

VIII.

The activities which the plaintiffs and said other employees similarly situated performed during each of said one-half ($\frac{1}{2}$) hours each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947 by virtue of and in accordance with the express provision of a written collective bargaining agreement then in effect between the plaintiffs, their collective bargaining representatives and the defendant. [31]

IX.

There is now due, owing and unpaid, from the defendant to the plaintiffs, and to each of the employees similarly situated, on behalf of whom this action is brought, a sum equal to one and one-half times the regular rate at which each such employee was employed and for which he was compensated, times three (3) or more hours for each week of his employment by the defendant, and for which he was not paid, plus an equal amount as liquidated damages.

X.

Section 16 (b) of the Act provides that the Court in this action shall, in addition to any judgment awarded to plaintiffs, allow a reasonable attorneys' fee to be paid, by the defendant.

Wherefore, plaintiffs pray judgment against the defendant and in favor of the plaintiffs and each of

the employees similarly situated, on behalf of whom this action is brought, in a sum equal to one and one-half times the regular rate at which each such employee was employed, times three (3) or more hours for which he was not paid in each week of his employment by the defendant, plus an equal amount as liquidated damages, plus attorneys' fees for services rendered herein, and for costs of suit and all proper relief.

MOHR and BORSTEIN and
PERRY BERTRAM.

By /s/ PERRY BERTRAM,

Attorneys for Plaintiffs. [32]

EXHIBIT 1

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Charles R. Cobb hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 11, 1949.

/s/ CHARLES R. COBB. [33]

EXHIBIT 2

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Frank Hemminger hereby consents to become a party plaintiff in the above en-

titled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: April 1, 1949.

/s/ FRANK HEMMINGER. [34]

EXHIBIT 3

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Fred M. Koehler hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 11, 1949.

/s/ FRED M. KOEHLER. [35]

EXHIBIT 4

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Oliver H. Raftery hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 12, 1949.

/s/ OLIVER H. RAFTERY. [36]

EXHIBIT 5

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Charles E. Smith-Sanford hereby consents to become a party plaintiff in the above

entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 12, 1949.

/s/ CHARLES E. SMITH-
SANFORD. [37]

EXHIBIT 6

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Harry Sortors hereby consents to become a party plaintiff in the above entitled consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938, as amended.

Dated: March 30, 1949.

/s/ HARRY SORTORS. [38]

EXHIBIT 7

[Title of District Court and Cause.]

CONSENT TO BECOME PARTY PLAINTIFF

The undersigned Luther M. Walters hereby consents to become a party plaintiff in the above entitled action for the purpose of obtaining unpaid overtime wages under the Fair Labor Standards Act of 1938 as amended.

Dated: March 14th, 1949.

/s/ LUTHER M. WALTERS. [39]

State of California,
County of Los Angeles—ss.

Harry Sortors being by me first duly sworn, de-

poses and says: that he is the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ HARRY SORTORS.

Subscribed and sworn to before me this 4th day of April, 1949.

[Seal] /s/ ELIZABETH N. DUMESNIL,
Notary Public in and for the County of Los Angeles
State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed April 6, 1949. [40]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION OF FACTS AND
STATEMENT OF ISSUES

Stipulation of Facts

It is hereby stipulated between the plaintiffs and defendant, through their respective counsel:

I.

The present name of the defendant is Consolidated Liquidating Corporation, and the pleadings on file may be amended to show said name in place of the name Consolidated Steel Corporation.

II.

At all times material to this action and during the employment by defendant of one or more of the plaintiffs and claimants, to-wit, from January 16, 1944 to and including November 29, 1946, the defendant produced ships under contract [41] with the United States Maritime Commission at shipyards at Wilmington, in the City and County of Los Angeles, State of California. Upon completion of construction, each ship was delivered to the United States Maritime Commission at said shipyards, and thereafter was sent by the United States Maritime Commission to points outside the State of California.

III.

During certain periods of the employment by defendant of one or more of the plaintiffs and claimants, to-wit, between January 1, 1945 and November 29, 1946, the defendant repaired and decommissioned Naval ships and vessels belonging to the United States Navy pursuant to contracts and commitments with the United States Navy.

IV.

Plaintiffs' Exhibit 1 is a copy of the collective bargaining agreement in existence between collective bargaining representatives of plaintiffs and claimants and the defendant during the periods to which plaintiffs' and claimants' claims relate.

V.

Defendant's Exhibit A is a copy of a government-owned facilities contract between the United States Maritime Commission and the defendant, which

contract states the terms under which the defendant operated shipyards at Wilmington, California on premises provided by said United States Maritime Commission. Said contract was in effect during all the time material to the issues presented herein, and related to the place at which plaintiffs and claimants performed the services which are the basis of the claims asserted in this action.

VI.

Defendant's Exhibit B is a copy of one of the vessel construction contracts between the United States Maritime [42] Commission and the defendant, which contract was in effect during the time material to the issues and claims asserted in this action.

Issues

1. Does the complaint state a claim of which this court has jurisdiction?

2. Were the plaintiffs and claimants employed by the defendant in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938, as amended?

3. In which workweeks, if any, did each of the plaintiffs and claimants work during their lunch periods?

4. If any lunch periods were worked by plaintiffs and claimants, was that work compensable under the collective bargaining agreement, Exhibit 1?

5. If such lunch periods were so compensable, was the failure by defendant to pay plaintiffs and claimants therefor in good faith?

6. Are the claims of the plaintiffs and claimants for compensation alleged to have been earned prior to May 14, 1945, barred by Sections 6, 7 and 8 of the Portal-to-Portal Act of 1947?

February 24, 1949.

MOHR & BORSTEIN and

PERRY BERTRAM,

By /s/ PERRY BERTRAM,

Attorney for Plaintiffs.

ALFRED WRIGHT and

HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,

Attorneys for Defendant.

[Endorsed]: Filed April 28, 1949. [43]

[Title of District Court and Cause.]

NOTICE OF MOTIONS: TO DISMISS AMENDED COMPLAINT, TO DISMISS CLAIMS OF CERTAIN CLAIMANTS, TO STRIKE CERTAIN MATTER, FOR A MORE DEFINITE STATEMENT

To the Plaintiffs and Other Claimants Herein, and to Their Attorneys, Mohr & Borstein and Perry Bertram:

Please Take Notice that on Monday, May 23, 1949, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the court room of the Hon. Peirson M. Hall, United States District Judge, located in the United States Post Office and Court House at Los Angeles, California, the defendant,

Consolidated Liquidating Corporation (sued and designated in the Amended Complaint under its former corporate name, Consolidated Steel Corporation, Ltd.), by and through its attorneys herein, will present motions for orders and relief, as follows:

I.

To dismiss the Amended Complaint and the pending action in its entirety. [109]

Said motion will be presented and urged upon the ground that the Amended Complaint fails to state a claim upon which relief can be granted against the defendant, particularly by reason of the provisions of the Portal-to-Portal Act of 1947 (29 USC 251, et seq) which delimit the types of activities which are compensable under the Fair Labor Standards Act of 1938, and further limit the jurisdiction of both Federal and State courts to proceedings to enforce liability only for activities of the types recognized as compensable.

II.

To dismiss the Amended Complaint and pending action to the extent that it purports to assert claims on behalf of "other employees similarly situated" to the plaintiffs Glenn O. Prickett, H. F. Winans and S. E. Whitney, which "other employees similarly situated" appear to be the following persons: Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Rafferty, Charles E. Smith-Sanford, Samuel D. Tinker, Luther M. Walters.

Said motion will be presented as an alternative to

the preceding motion, and will be urged upon the additional grounds that it appears upon the face of the Amended Complaint and from the exhibits attached thereto that the alleged claims of the above-named claimants accrued prior to the enactment of the Portal-to-Portal Act of 1947, on May 14, 1947; that said claimants were not parties plaintiff herein at any time prior to May 14, 1947; that said claimants did not become parties plaintiff herein within one hundred and twenty (120) days after the date of the enactment of the Portal-to-Portal Act of 1947; that the [110] pending action may not be considered pending as to said claimants at any time prior to April 6, 1949, the date on which their purported respective written Consents to participate in this action were filed in this Court; that by reason of the foregoing facts said claimants have no status in the pending action, and their alleged claims are barred by the applicable statute of limitations, all as provided in the Portal-to-Portal Act of 1947 (29 USC 251, et seq).

III.

To strike from the amended Complaint the following matter:

(a) Paragraph I, page 1, line 22, the words "and all other employees similarly situated."

(b) Paragraph III, page 2, lines 1 to 9, inclusive, the entire paragraph as follows:

"The other employees similarly situated and on behalf of whom this action is brought are: Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO FILE
RECORD AND DOCKET APPEAL, AND
ORDER GRANTING TIME

It is hereby stipulated by and between plaintiffs and appellants and defendant and appellee, through their respective attorneys, that the time within which to file the record and docket the appeal herein may be extended to the 20th day of September, 1949.

Dated: July 22, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ DAVID L. MOHR,
Attorneys for Plaintiffs and
Appellants.

ALFRED WRIGHT and
HAROLD F. COLLINS,

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant and
Appellee.

It Is So Ordered.

Dated: July 27, 1949.

/s/ PEIRSON M. HALL,
Judge. [127]

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil No. 6274-PH

GLENN O. PRICKETT, et al.,

Plaintiffs and Appellants,

vs.

CONSOLIDATED STEEL CORPORATION,
Defendant and Appellee.

ORDER OF DISMISSAL AS TO
CERTAIN PLAINTIFFS

The motions of defendant, Consolidated Liquidating Corporation, sued herein as Consolidated Steel Corporation to dismiss the amended complaint as to the Plaintiffs and as to certain other claimants having come on regularly for hearing before this Court on May 23, 1949, and the plaintiffs and other claimants being represented by their counsel, Mohr and Borstein and Perry Bertram, by Perry Bertram, and the defendant being represented by its counsel, Alfred Wright and Harold F. Collins, by Harold F. Collins, and arguments having been presented on behalf of both parties, the Court being fully advised, and the matter being submitted.

It Is Ordered and Adjudged, that the motion to dismiss certain claimants named in the amended complaint is hereby granted as to the following named claimants, to wit: [128] Charles R. Cobb,

Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker, Luther M. Walters.

It Is Further Ordered and Adjudged, that the motion to dismiss the amended complaint as to Glenn O. Prickett, H. F. Winans and S. E. Whitney, is denied.

It Is Further Ordered and Adjudged, that the motion to strike from the amended complaint be and the same hereby is denied.

It Is Further Ordered and Adjudged, that the motion for a more definite statement be and the same hereby is denied.

Dated: 9/8/49, 1949.

/s/ PEIRSON M. HALL,
Judge.

Approved As To Form:

Dated: Sept. 7, 1949.

ALFRED WRIGHT &
HAROLD F. COLLINS

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

Judgment entered Sept. 8, 1949.

Docketed Sept. 8, 1949.

[Endorsed]: Filed Sept. 8, 1949. [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant and Appellee and to the Clerk
of the United States District Court:

Please Take Notice that the plaintiffs hereby appeal to the Court of Appeals for the Ninth Circuit from that portion of the Order of Dismissal in the above-entitled case signed September 8, 1949, filed and entered September 8, 1949 which dismisses the claims of Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker and Luther M. Walters.

Dated: September 8, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 8, 1949. [130]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellants hereby designate the following pleadings and exhibits to be prepared and forwarded to the Court of Appeals, Ninth Circuit, as the record on the appeal:

1. Complaint. Filed 1/16/47.
2. Notice of Motions: To dismiss action, to

Cobb, Charles E. Smith-Sanford. Each of those employees have consented in writing to become parties to this action, their written consents being attached hereto as Exhibits one through seven inclusive and by this reference made a part hereof.", together with the several exhibits Nos. 1 to 7, inclusive, mentioned therein and attached to the Amended Complaint.

(c) Paragraph VI, page 2, line 24, the words "and other employees similarly situated."

(d) Paragraph VI, page 3, the several words and clauses as follows: "and said other employees similarly [111] situated" in lines 3 and 4; "and each such employees" in line 6; "and other employees similarly situated" in line 9; "and other employees similarly situated" in line 19.

(e) Paragraph VIII, page 3, lines 24 and 25, the words: "and said other employees similarly situated."

(f) Paragraph IX, page 4, lines 3, the words: "and to each of the employees similarly situated on behalf of whom this action is brought."

(g) Concluding paragraph, page 4, lines 16 and 17, the words: "and each of the employees similarly situated on behalf of whom this action is brought."

Said Motion to Strike each of the foregoing portions of the Amended Complaint will be presented as an alternative to the foregoing motions and will be urged upon the ground that "employees similarly situated," including those named in Paragraph III thereof, have no standing as parties or litigants in this action and no claims can be asserted in their

behalf by plaintiffs herein for the reasons, as more particularly stated in the foregoing Motions, that said claims have not been presented in the manner or within the time required by the Portal-to-Portal Act of 1947, and as a result this Court has no jurisdiction to consider or determine the alleged claims of any "employee similarly situated" to plaintiffs.

IV.

For more definite statement of certain matters alleged in Paragraph VIII of the Amended Complaint, to wit:

(a) the particular language of the alleged "express provision of a written collective bargaining agreement" under and pursuant to which "activities * * * performed during each of said one-half (1½) hours [112] each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended, by the Portal-to-Portal Act of 1947."

Said Motion will be presented and urged as an alternative to defendant's Motion to dismiss the Amended Complaint and pending action, and will be based upon the ground that the allegations contained in said Paragraph VIII are so vague and ambiguous that defendant cannot reasonably be required to frame a responsive pleading thereto; and said allegations are mere conclusions of the pleader which are uninformative in fact and insufficient in law.

The foregoing Motions will be based upon the pleadings and records herein, and defendant will

rely upon the Memorandum of Points and Authorities In Support of Motions, which is presented herewith.

Dated at Los Angeles, California, this 5th day of May, 1949.

ALFRED WRIGHT and
HAROLD F. COLLINS

By/s/ HAROLD F. COLLINS,
Attorneys for Consolidated
Liquidating Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed May 5, 1949. [113]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 23rd day of May, in the year of our Lord one thousand nine hundred and forty-nine.
Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

For hearing on motion of defendant Consolidated Liquidating Corp. to dismiss the amended complaint, to dismiss claims of certain claimants, to strike certain matter, and for a more definite statement, pursuant to notice thereof filed May 5, 1949; Perry Bertram, Esq., appearing as counsel for

plaintiffs; H. F. Collins, Esq., appearing as counsel for defendant;

Attorney Collins makes a statement in support of motion to dismiss. Attorney Bertram argues in opposition to motion to dismiss.

Court orders motion to dismiss as to parties similarly designated granted, and as to parties-plaintiff denied with ten days allowed to amend the amended complaint and Court orders cause continued to June 27, 1949, 10 a.m., for setting. [124]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, Consolidated Steel Corporation,
and to Alfred Wright and Harold F. Collins,
Esqs., its attorneys, and to the Clerk of the
above-entitled Court:

Notice is hereby given that plaintiffs, Luther M. Walters, Samuel D. Tinker, Frank Hemminger, Oliver H. Raftery, Fred M. Koehler, Charles R. Cobb and Charles E. Smith-Sanford, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of Dismissal as to each of them, entered in this action on May 23rd, 1949.

Dated: June 22, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ DAVID L. MOHR,

Attorneys for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed June 22, 1949. [125]

strike matters, for more definite statement, and for bill of particulars. Filed 4/11/47.

3. Order of May 12, 1947 on Motions to Dismiss, etc.

4. Bill of Particulars. Filed 6/5/47.

5. Answer to Complaint. Filed 6/16/47.

6. Pre-Trial Stipulation of Facts and Statement of Issues. Filed 4/28/49.

7. Order on Pre-Trial Conference. Filed 3/7/49.

8. Amended Complaint. Filed 4/6/49. [132]

9. Notice of Motion by Defendant to Dismiss Certain Plaintiffs in Amended Complaint. Filed 5/5/49.

10. Order Granting Motion to Dismiss as to Parties Similarly Situated. Filed 5/23/49.

11. Notice of Appeal. Filed 6/22/49.

12. Order of Dismissal entered September 8, 1949. Filed 9/8/49.

13. Notice of Appeal from said Order of Dismissal. Filed 9/8/49.

Dated: September 7, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 8, 1949. [133]

[Title of District Court and Cause.]

STIPULATION RE CLERK'S RECORD
ON APPEAL AND WAIVER

It Is Hereby Stipulated, by and between the plaintiffs and appellants and the defendant and appellee, by and through their respective counsel, that the Clerk's record designated by the plaintiffs and appellants shall be the record on appeal and the defendant and appellee hereby waives the right to designate further or additional record to be included therein.

Dated: September 7, 1949.

MOHR and BORSTEIN and
PERRY BERTRAM

By /s/ PERRY BERTRAM,
Attorneys for Plaintiffs.

ALFRED WRIGHT &
HAROLD F. COLLINS

By /s/ HAROLD F. COLLINS,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 8, 1949. [135]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 135, inclusive, contain the original Complaint for Wages and Liquidated Dam-

ages Due Under the Fair Labor Standards Act of 1938; Notice of Motions to Dismiss Action; to Strike Matter; for More Definite Statement and Bill of Particulars and Memorandum of Points and Authorities; Bill of Particulars; Answer to Complaint; Amended Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Pre-Trial Stipulation of Facts and Statement of Issues and Exhibits thereto; Notice of Motions to Dismiss Amended Complaint; to Dismiss Claims of Certain Claimants; to Strike Certain Matter for a More Definite Statement and Memorandum of Points and Authorities in Support of Motions; Notice of Appeal filed June 22, 1949; Stipulation and Order Extending Time to File Record and Docket Appeal; Order of Dismissal as to Certain Plaintiffs; Notice of Appeal filed Sept. 8, 1949; Designation of Record on Appeal and Stipulation re Clerk's Record on Appeal and Waiver and full, true and correct copies of minute orders entered May 12, 1947, March 7, 1949 and May 23, 1949 which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16th day of September, A.D. 1949.

EDMUND L. SMITH,

Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12360. United States Court of Appeals for the Ninth Circuit. Glenn O. Prickett, H. F. Winans and S. E. Whitney, on behalf of themselves and other employees similarly situated, Appellants, vs. Consolidated Liquidating Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed September 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the U. S. Circuit Court of Appeals,
Ninth Circuit
No. 12360

GLENN O. PRICKETT, et al,
Appellants,
vs.

CONSOLIDATED LIQUIDATING CORP.,
Appellee.

STATEMENT OF POINTS
ON APPEAL

Appellants in the above entitled action in compliance with Rule 19, subdivision 6, of the Rules of Practice of the above entitled court herewith submit their points on appeal:

The court erred:

1. In requiring the appellants to file consents to become parties plaintiff.

2. In ruling that the appellants were required to file consents to become parties plaintiff on or before ninety (90) days following the effective date of the Portal-to-Portal Act of 1947.

3. In dismissing the appellants' causes of action on the ground that appellants had not complied with the requirements pertaining to representative actions as provided in the Portal-to-Portal Act of 1947.

4. In granting defendant's motion to dismiss appellants' causes of action.

September 22, 1949.

Respectfully submitted,

MOHR & BORSTEIN and
PERRY BERTRAM,

By /s/ PERRY BERTRAM.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 22, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

To the Clerk of the above entitled court and to the Appellee above named and to Wright and Collins, its attorneys:

Appellant hereby designates as the record to be

printed on the appeal herein, the entire Clerk's Transcript of Record, except, and it hereby requests to be omitted from the printed record, the following portions of the Clerk's Transcript:

Pages 10 to 14, inclusive, being Memorandum of Points and Authorities in Support of Defendant's Motions to Dismiss, to Strike, and for a More Definite Statement, filed April 11, 1947.

Pages 44 to 108, inclusive, being the Collective Bargaining Agreement between the parties attached as Plaintiffs' Exhibit 1 to the Pre-Trial Stipulation; the Maritime Commission Contract attached as Defendant's Exhibit A to said Pre-Trial Stipulation; and the Vessel Construction Contract attached as Defendant's Exhibit B to said Pre-Trial Stipulation.

Pages 114 to 122, inclusive, being the Memorandum of Points and Authorities in Support of Defendant's Motions directed to the Amended Complaint, filed May 5, 1949.

Respectfully submitted,
MOHR & BORSTEIN and
PERRY BERTRAM,

By/s/ PERRY BERTRAM.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 22, 1949.

No. 12360.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF.

FILED

DEC 14 1940

PAUL P. BORCHERS

MOHR & BORSTEIN,
719 Park Central Building, Los Angeles 14,
PERRY BERTRAM,
744 Occidental Life Building, Los Angeles 15,
Attorneys for Appellants.



TOPICAL INDEX.

PAGE

I.

Basis of original and appellate jurisdiction.....	1
---	---

II.

Statement of the issue.....	2
-----------------------------	---

III.

Statement of facts.....	3
-------------------------	---

IV.

Summary of argument	4
---------------------------	---

V.

Argument	5
----------------	---

1. The cause of action of each employee is separate and distinct from his fellow and therefore each "employee similarly situated" is a plaintiff..... 5
2. The naming of appellants in the bill of particulars was equivalent to naming them as plaintiffs in their original complaint 6
3. All of the appellants were named as parties plaintiff within 120 days of the effective date of the Portal-to-Portal Act, and therefore, they were not required to file written consents 7

Conclusion	10
------------------	----

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Abel v. Munro, 27 Fed. Supp. 346.....	6
Bartels v. Piel Bros., Inc., 74 Fed. Supp. 41.....	9
Bartels v. Sperti, Inc., 13 Labor Cases, par. 63994.....	9
Carvalho v. John Doe, dba Byrne Organization, 7 F. R. D. 469	9
Central Mo. Telephone Co. v. Conwell, 170 F. 2d 641.....	8
Christianson v. West Publishing Co., 53 Fed. Supp. 454; affd., 149 F. 2d 202.....	6
Cook v. American Viscose Corp., 13 Labor Cases, par. 64168....	9
Cox v. Doherty, 1 F. R. D. 564.....	6
Fink v. Oliver Iron Mining Co., 65 Fed. Supp. 316.....	5
Gibbons v. Equitable Life Assurance Society, 173 F. 2d 337.....	8
Pentland v. Dravo Corp., 152 F. 2d 851; affg. 4 F. R. D. 350....	5
Sadler v. Dickey Clay Mfg. Co., 73 Fed. Supp. 690.....	9
Sheehan v. Municipal Light & Power Co., 1 F. R. D. 256.....	6
Smith v. Stark Trucking Co., 53 Fed. Supp. 826.....	5
Tennessee C. I & R. Co. v. Muscoda Local, 5 F. R. D. 174.....	5

STATUTES

Fair Labor Standards Act of 1938, Sec. 16(b).....	1
Judicial Code, Sec. 24(8) (28 U. S. C., Sec. 41(8)).....	1
Judicial Code, Sec. 128 (28 U. S. C., Sec. 225).....	1
Portal-to-Portal Act of 1947, Sec. 2.....	1
Portal-to-Portal Act, Sec. 5.....	7
Portal-to-Portal Act, Sec. 6.....	7
Portal-to-Portal Act, Sec. 6(b).....	8
Portal-to-Portal Act, Sec. 8.....	4, 7, 9, 10
Public Law No. 49, 80th Cong., Chap. 52.....	1
Public Law No. 718, 75th Cong., Chap. 676 (52 Stat. 1060- 1069 (1938); 29 U. S. C., Secs. 201-219).....	1
Rules of Civil Procedure, Rule 12(e).....	6

No. 12360.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Basis of Original and Appellate Jurisdiction.

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.¹ Jurisdiction vested in the District Court by that section and by Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)). Section 2 of the Portal-to-Portal Act of 1947² did not withdraw jurisdiction of the claims of the appellants herein.

This Court has jurisdiction of the appeal under the provisions of Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

¹Public Law No. 718, 75th Cong., Chap. 676; 52 Stat. 1060-1069 (1938); 29 U. S. C., Secs. 201-219.

²Public Law No. 49, 80th Cong., Chap. 52.

II.

Statement of the Issue.

The question involved in this appeal is the following: In an action under the Fair Labor Standards Act, filed before the effective date of the Portal-to-Portal Act of 1947, was it necessary to file, within 120 days of that date, the "written consents" of the employees alleged to have been similarly situated with the plaintiffs originally named, where those employees were named in a Bill of Particulars filed pursuant to Court order within said 120 days?

This issue was raised by the suggestion of the trial court during a pre-trial hearing held on March 7, 1949, that the plaintiffs would be required to file written consents to appear as parties plaintiff, following which, upon the filing of such written consents, the Court granted defendants' motion to dismiss as to the "employees similarly situated" on the ground that they had not filed such written consents within 120 days of the enactment of the Portal-to-Portal Act.

III.

Statement of Facts.

On January 16, 1947, a claim was filed for overtime compensation alleged to be due under the Fair Labor Standards Act of 1938 by Glenn O. Prickett, H. F. Winans and S. E. Whitney "on behalf of themselves and other employees similarly situated, Plaintiffs." The first paragraph in said complaint alleged that plaintiffs brought the action "on behalf of themselves and all other employees similarly situated." [Tr. p. 2.]

On April 11, 1947, defendant filed its Notice of Motions to Dismiss the Action, to Strike Certain Matters from the Complaint, and in the Alternative for a More Definite Statement and Bill of Particulars. [Tr. p. 5.] The latter motion sought to obtain detailed information concerning the work and identity of each "plaintiff and claimant."

On May 12, 1947, said motions were argued and the Court struck from the calendar the motions to dismiss and to strike and granted the motion for a Bill of Particulars. [Tr. p. 10.]

On May 14, 1947, the Portal-to-Portal Act of 1947 was signed by the President and became effective.

On June 5, 1947, the plaintiffs filed their Bill of Particulars in which each of the plaintiffs including the employees similarly situated were named, their duties and nature of their claims given and otherwise the particulars called for by defendants' motion furnished. [Tr. pp. 11-14.]

Thereafter on June 16, 1947, the defendant filed its answer. [Tr. p. 14.]

On March 7, 1949, a pre-trial hearing was held during which the Court indicated that the plaintiffs would be required to file an Amended Complaint to allege additional jurisdictional facts required by the Portal-to-Portal Act, and to file written consents on the part of the employees similarly situated. This was done on April 6, 1949.

On May 5, 1949 the defendant moved to dismiss the claims of the plaintiffs other than those who were originally named in the caption of the first complaint on the ground that they "did not become parties plaintiff herein within one hundred twenty days (120) of the enactment of the Portal-to-Portal Act of 1947." This motion was granted on May 23, 1949, and a formal order of dismissal as to the appellants herein was entered September 8, 1949.

The appellants are Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel D. Tinker and Luther M. Walters.

IV.

Summary of Argument.

Section 8 of the Portal-to-Portal Act required the filing of written consents to become parties plaintiff only by those employees who had not appeared and became parties plaintiff either before the passage of the Portal-to-Portal Act or within 120 days thereafter. Each of the appellants herein became parties plaintiff at the time the action was first filed. At all events, they were named as parties plaintiff on June 5, 1947, which was within 120 days after the Portal-to-Portal Act went into effect.

V.

ARGUMENT.

1. The Cause of Action of Each Employee is Separate and Distinct From His Fellow and Therefore Each "Employee Similarly Situated" Is a Plaintiff.

Long before the passage of the Portal-to-Portal Act of 1947, the courts had occasion to consider the nature of the so-called "representative" actions filed under the Fair Labor Standards Act.

It was uniformly held that these actions were not true representative or class actions in the commonly understood sense of the term. They were frequently referred to as "spurious class actions." The courts pointed out that in a true class action, the cause of action of each of the members of the class is identical and all of the members of the class are bound by the judgment. Under the Fair Labor Standards Act, however, the claims which were joined in a single action, while similar, were not identical. The causes of action were several and the judgments several. Frequently, judgments were rendered in favor of one or more employees and against others in the same action. Discussion of these problems is well presented in

Pentland v. Dravo Corp., 152 F. 2d 851, affirming
4 F. R. D. 350.

See also in this connection:

Tenn. C. I. & R. Co. v. Muscoda Local, 5 F. R. D.
174;

Fink v. Oliver Iron Mining Co., 65 Fed. Supp. 316;

Smith v. Stark Trucking Co., 53 Fed. Supp. 826.

Accordingly, it is obvious that each employee similarly situated is a plaintiff as to his own cause of action.

2. The Naming of Appellants in the Bill of Particulars Was Equivalent to Naming Them as Plaintiffs in Their Original Complaint.

Rule 12(e) of the Rules of Civil Procedure specifically provides "A bill of particulars becomes a part of the pleading which it supplements." Numerous cases have interpreted and given effect to this provision. See for example the following:

Christianson v. West Publishing Co., 53 Fed. Supp. 454 (Aff'd, 149 F. 2d 202 (1945));

Cox v. Doherty, 1 F. R. D. 564 (D. C. Cal. 1941);

Sheehan v. Municipal Light & Power Co., 1 F. R. D. 256 (S. D., N. Y., 1940).

The Bill of Particulars does not supersede the Complaint but simply limits it and makes its allegations more definite and certain.

Abel v. Munro, 27 Fed. Supp. 346 (E. D., N. Y., 1939).

Accordingly, when in this case the caption and the body of the Complaint recited that three named individuals and other employees similarly situated were the plaintiffs and the Bill of Particulars filed pursuant to Court order named all of the employees similarly situated, it is manifest that all of these employees were named as parties plaintiff.

3. All of the Appellants Were Named as Parties Plaintiff Within 120 Days of the Effective Date of the Portal-to-Portal Act and, Therefore, They Were Not Required to File Written Consents.

The Portal-to-Portal Act of 1947 became effective May 14, 1947.

Section 5, banning representative actions, applied specifically to actions brought on or after the effective date of the Portal-to-Portal Act.

Section 6 established a two year Statute of Limitations for causes of action accruing on or after the date of the Act, and to causes of action accruing prior to the effective date but not filed upon until after 120 days thereafter.

Section 8 deals with pending collective and representative actions and is the only section applicable to the issue here involved. That section is as follows:

“Sec. 8. Pending Collective and Representative Actions—The statute of limitations prescribed in section 6(b) shall also be applicable (in the case of a collective or representative action commenced prior to the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after the date of the enactment of this Act. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.”

It is clear from a reading of this section that the two year statute of limitations prescribed in Section 6(b) applies in a pending collective or representative action only "to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of 120 days after the enactment of this Act." The second sentence dealing with written consents just as clearly applies only to the individual claimant who has not been specifically named as a party plaintiff within that period. Where the individual claimant has been named, Section 6(b) does not apply and there is no requirement that his written consent be filed.

This precise point has been considered by two Circuit Courts of Appeal and in each instance the interpretation here urged has been adopted.

In *Central Mo. Telephone Co. v. Conwell* (C. C. A. 8, 1948), 170 F. 2d 641, it appeared that Miss Conwell had filed the action on behalf of herself and a co-employee "similarly situated." The co-employee, Laura Pinkepank did not appear as party plaintiff in the caption of the Complaint but was so described in the body of the Complaint. The court below (76 Fed. Supp. 398) held that Laura Pinkepank was named within the 120 day period and it was not necessary, therefore, for her to file a written consent. The court on appeal affirmed this ruling and stated that under section 8 it was sufficient for Laura Pinkepank to have been described in the body of the complaint as the plaintiff and the statute of limitations prescribed by the Portal-to-Portal Act was not applicable to her.

In *Gibbons v. Equitable Life Assurance Society* (C. C. A. 2, 1949), 173 F. 2d 337, the complaint was filed by Mr. Gibbons in October of 1944 alleging that eight named employees had authorized him to file the action on their

behalf. On September 23, 1947, the court below granted defendant's motion to dismiss the action of the 8 named employees because they had not filed written consents within the 120 day period. On appeal the order was reversed, the court pointing out that Section 8 does not apply to actions filed before May 14, 1947, where the claimants are named as parties plaintiff. The court held that if the 8 were named they did not have to file written consents. The defendant's contention that the 8 were not specifically named as parties plaintiff was dismissed by the Circuit Court as "purely technical," the court saying:

"To hold that they were not named as plaintiffs would involve refinements of reasoning and disregard of the real facts that would not be in accord with any sensible or even rational interpretation of the complaint or the answer or the acts of the parties taken as a whole."

The court said that it was sufficient that the complaint stated their names, described their claims and indicated that the action was brought on their behalf.

Similar results have been reached by several District Court decisions.

Bartels v. Sperti, Inc. (S. D., N. Y., 1947), 13 Labor Cases, par. 63994;

Bartels v. Piel Bros., Inc. (E. D., N. Y., 1947), 74 Fed. Supp. 41.

See:

Carvalho v. John Doe, dba Byrne Organization (D. C. Hawaii 1947), 7 F. R. D. 469;

Cook v. American Viscose Corp. (S. D., N. Y., 1947), 13 Labor Cases, par. 64,168;

Sadler v. Dickey Clay Mfg. Co. (W. D. Mo., 1947), 73 Fed. Supp. 690.

Conclusion.

The cases clearly establish that each individual employee whose claim is presented in an action under Fair Labor Standards Act is a plaintiff. The Bill of Particulars becomes a part of the pleading to which it refers. In this case each of the appellants were named in a Bill of Particulars filed on June 5, 1947, which was within the 120 day period mentioned in Section 8 of the Portal-to-Portal Act. Accordingly, each of the appellants was named as a party plaintiff within that period.

Section 8 of the Portal-to-Portal Act does not require the filing of written consents on behalf of the employees who were named as the appellants were in this case.

Accordingly, it was error to dismiss their claims and the order of the court below should be reversed.

Respectfully submitted,

MOHR & BORSTEIN and

PERRY BERTRAM,

Attorneys for Appellants.

No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY,
on behalf of themselves and other employees similarly
situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLEE'S REPLY BRIEF.

FILED

JAN 11 1950

PAUL P. O'BRIEN,
CLERK

ALFRED WRIGHT and
HAROLD F. COLLINS,
621 South Spring Street, Los Angeles 14,
Attorneys for Appellee.



TOPICAL INDEX

	PAGE
I.	
Jurisdiction	1
II.	
Statement of facts.....	2
III.	
Appellee's statement of issues.....	3
IV.	
Argument	5
1. The appeal should be dismissed for want of an appealable order	5
2. The Portal-to-Portal Act at all times since its enactment has been applicable to appellant's claims.....	6
3. Appellants' claims were dismissible for want of jurisdic- tional allegations in the amended complaint.....	12
Conclusion	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bartels v. Piel Bros., Inc., 74 Fed. Supp. 41.....	10
Bartels v. Sperti, Inc., 73 Fed. Supp. 751; 13 Labor Cases, par. 63,994	10
Bonner v. Elizabeth Arden, Inc., 179 F. 2d 703; aff'd, 80 Fed. Supp. 243	7, 15
Bumpus v. Remington Arms Co., 77 Fed. Supp. 94.....	15
Central Missouri Telephone Co. v. Conwell, 170 F. 2d 641.....	8
City and County of San Francisco v. McLaughlin, 9 F. 2d 390	5
Coyle v. Philadelphia Macaroni Co., 9 F. R. D. 331.....	13
Gibbons v. Equitable Life Assurance Society, 173 F. 2d 337.....	9
Hutchings v. Lando, 83 Fed. Supp. 615.....	14
Kuly v. White Motor Co., 174 F. 2d 742.....	5
Lassiter v. Guy F. Atkinson Co., 176 F. 2d 984.....	16
Lockwood v. Hercules Powder Co., 78 Fed. Supp. 716; dis- missed, 172 F. 2d 775.....	5, 10, 11
Manosky v. Bethlehem Hingham S. Corp., 16 Labor Cases, pars. 64,895, 65,045	15
Newson v. E. I. DuPont de Nemours & Co., 173 F. 2d 856.....	15
Story v. Todd Houston S. Corp., 72 Fed. Supp. 690.....	13
Tipton v. Bearl Sprott Co., 175 F. 2d 432.....	3, 7, 12, 15

STATUTES

Federal Rules of Civil Procedure, Rule 12(e).....	7
Federal Rules of Civil Procedure, Rule 54	2, 5
Portal-to-Portal Act of 1947 (Chap. 52, Pub. Law 49, 80th Cong., 29 U. S. C., Sec. 251 et seq.).....	6
Portal-to-Portal Act of 1947, Sec. 1.....	16
Portal-to-Portal Act of 1947, Sec. 2(a)(1), (2) (29 U. S. C., Sec. 252(a)(1), (2)).....	13
Portal-to-Portal Act of 1947, Sec. 8 (29 U. S. C., Sec. 258).....	4, 7, 8, 11, 12
United States Code, Title 28, Sec. 1291	1, 5
United States Code, Title 28, Sec. 1292	2, 5

No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY,
on behalf of themselves and other employees similarly
situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLEE'S REPLY BRIEF.

I.

Jurisdiction.

The District Court's jurisdiction to entertain the claims of the three original plaintiffs and the seven appellant-claimants has been consistently challenged by appellee at all stages of the litigation to date. On this appeal this Court is primarily concerned with the jurisdictional limitations imposed by the Portal-to-Portal Act of 1947 which are noted hereinafter.

The jurisdiction of this Court of Appeals to consider and decide the instant appeal on merits is challenged by appellee, first, because the Order of Dismissal dated September 8, 1948 [Tr. pp. 38 and 39] is neither a "final decision" within the scope of 28 U. S. C., §1291, nor an appealable "interlocutory order" of any type described in

28 U. S. C., §1292; and secondly, because said Order, which dismisses some, but not all of the claims presented in the Amended Complaint, was not made appealable by “expressed determination” and “expressed direction” of the trial court, as required by subdivision (b) of revised Rule 54 of the Federal Rules of Civil Procedure.

II.

Statement of Facts.

The Statement of Facts contained in Appellants’ Opening Brief is regarded as incomplete in certain particulars which are deemed pertinent to this appeal. Appellee directs attention to the following additional facts.

It should be noted at the outset that the designation in captions of both the Transcript of Record and Appellants’ Opening Brief of “Glenn O. Prickett, H. F. Winans and S. E. Whitney, on behalf of themselves and other employees similarly situated” as “Appellants” is misleading and erroneous. The Notice of Appeal states, and Appellants’ Opening Brief confirms, that the present appeal is from only that portion of the District Court’s order which dismisses the claims of seven claimants, namely, Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel Tinker, and Luther M. Walters. Plaintiffs Prickett, Winans and Whitney have no personal interest in that portion of the Order and Appellants’ Opening Brief (p. 4) indicates that they are not appellants herein.

Although the instant action was commenced in the District Court on January 16, 1947 by the three named plaintiffs, assertedly on behalf of themselves and “all other employees similarly situated” [Complaint, par. I; Tr. p.

2], there was no identification of any of the "other employees similarly situated" as claimants in the pending action at any time prior to the enactment of the Portal-to-Portal Act of 1947 on May 14, 1947.

Effective May 14, 1947, the Portal-to-Portal Act became applicable to the instant action. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432.) The identification of the seven appellants as claimants was made for the first time in a bill of particulars filed June 5, 1947. This bill of particulars did not satisfy the express requirements of the Portal-to-Portal Act that each claimant file his written consent to become a party plaintiff. No attempt whatever was made to comply with the requirements of the Portal-to-Portal Act until the filing of the Amended Complaint on April 6, 1949, which was more than twenty-three months after the enactment of the Portal-to-Portal Act, and more than twenty months after the 120-day grace period provided therein in favor of claimants such as appellants. Attached to the Amended Complaint filed April 6, 1949 were seven exhibits, each designated as a "Consent to Become Party Plaintiff," one signed by each individual appellant on a date between March 11 and April 1, 1949 [Tr. pp. 24-26].

III.

Appellee's Statement of Issues.

Appellants' Opening Brief assumes that there is presented to this court for decision the solitary question whether, as a condition of appellants' rights to litigate their claims in the pending action, it was necessary that they, as "employees similarly situated" to the three original plaintiffs, file in said action, within 120 days after the enactment of the Portal-to-Portal Act (*i. e.*, on

or before September 11, 1947) their several written consents to appear therein as parties plaintiff.

Appellee asserts that additional questions and matters are presented for disposition, and that they are more properly stated as follows:

(1) Does this Court of Appeals have jurisdiction to consider and determine the purported appeal by the seven appellants from the limited portion of the District Court's Order of September 8, 1949, stated in the Notice of Appeal dated September 8, 1949? [Tr. p. 40].

(2) As of May 14, 1947 (the effective date of the Portal-to-Portal Act of 1947), were the seven appellants sufficiently identified as "plaintiffs" in the present action to be excused from compliance thereafter with the substantive and procedural provisions of the said Act?

(3) Did the bill of particulars filed June 5, 1947, have the effect of excusing appellants as "employees similarly situated" from compliance thereafter with the requirement of Section 8 of the Portal-to-Portal Act of 1947 (29 U. S. C. 258), that claimants other than original plaintiffs file timely "written consents" to become parties plaintiff?

(4) Did the Amended Complaint filed April 6, 1949, state a claim for relief on behalf of appellants of which the District Court was shown to have jurisdiction?

IV.
ARGUMENT.

1. The Appeal Should Be Dismissed for Want of an Appealable Order.

No argument seems necessary to demonstrate that the District Court's Order of September 8, 1949 [Tr. pp. 38-39] is not a "final decision" within the scope of 28 U. S. C. §1291, because the Order leaves pending and undetermined in the District Court the claims of three original plaintiffs Prickett, Winans and Whitney. (See *City and County of San Francisco v. McLaughlin* (9 Cir., 1925), 9 F. 2d 390.) On its face, the Order does not purport to be one of the five classes of "interlocutory decisions" which are expressly made appealable by 28 U. S. C. §1292. Moreover, it does appear that the Order falls within the descriptive language of subdivision (b) of revised Rule 54 of the Federal Rules of Civil Procedure, which is applicable to "any order or other form of decision, however designated, which adjudicates less than all of the claims" presented in an action. As an order of the latter type, it is not appealable because the trial judge did not put into effect the condition precedent to appeal by directing the entry of a final judgment as to the seven appellants "upon an expressed determination that there is no just reason for delay." (See *Lockwood v. Hercules Powder Co.* (8 Cir., 1949), 172 F. 2d 775; *Kuly v. White Motor Co.* (6 Cir., 1949), 174 F. 2d 742.)

2. The Portal-to-Portal Act at All Times Since Its Enactment Has Been Applicable to Appellants' Claims.

As of May 14, 1947, the effective date of the Portal-to-Portal Act of 1947 (Chap. 52, Public Law 49, 80th Cong., 29 U. S. C. §251 *et seq.*), the instant litigation was in this posture: There was on file a complaint, filed by the three named plaintiffs Prickett, Winans and Whitney "on behalf of themselves and other employees similarly situated," who were indeminately described as shipyard workers employed by defendant as "maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, tool room attendants, tool room mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities" [Tr. p. 3]. This complaint did not refer by name to the seven appellants, nor to any of the several hundred other employees of the defendant who might come within the scope of the general description of workers above mentioned. Only two days prior to May 14, 1947, the trial court ordered plaintiffs to furnish a bill of particulars showing the names, job classifications, duties and periods of employment of each of the plaintiffs and the several other claimants, and plaintiffs' authorizations to sue on behalf of such other claimants.

Such was the status of the case on May 14, 1947. Approximately three weeks thereafter, to-wit, on June 5, 1947, there was filed by plaintiffs a bill of particulars which showed the names of the plaintiffs and other claimants similarly situated to them, their respective job classifications, and the approximate dates of employment, but which did not contain (as demanded by defendant, promised by plaintiffs and ordered to be furnished by the

court) any statement showing “(e) the date, form and nature of every authorization under which any of the plaintiffs assert the right to represent each such claimant in the pending action.” [Tr. pp. 9 and 10.] Furthermore, said bill of particulars was not verified by any plaintiff or other claimant, or by counsel in their behalf.

It is the apparent contention of appellants that the bill of particulars which was filed June 5, 1947, cured the infirmities of the complaint as it stood on May 14, 1947, so far as it purported to present the claims of the seven appellants. In support of this position, appellants cite Rule 12(e) of the Federal Rules of Civil Procedure, to the effect that “a bill of particulars becomes a part of the pleading which it supplements.” It is true that prior to its amendment, Rule 12(e) did contain the above quoted phrase; but this language has been stricken from the revised Rule and, in fact, all provisions for a bill of particulars have been deleted from the revised Rule. Under the circumstances, there is presented the academic question whether the bill of particulars in this case served any real function. However, it seems unnecessary to discuss or resolve such question on this appeal because the real issue is not whether a bill of particulars amends a pleading to which it is addressed, but whether appellants complied with the provisions of Section 8 of the Portal-to-Portal Act which they were required to observe within 120 days after May 14, 1947. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, and *Bonner v. Elizabeth Arden, Inc.* (2 Cir., 1949), 177 F. 2d 703.) Section 8 of the Act required that in the case of a collective or representative action commenced prior to May 14, 1947, the claim of an individual claimant who had not been specifically named as a party plaintiff should be barred unless, within 120

days after the enactment of the Act, his written consent to become a party plaintiff to the action be filed in the Court in which the action is brought (29 U. S. C., Sec. 258). No written consent or any other equivalent instrument signed by any of the seven appellants was filed in the trial court until April 6, 1949. Appellants seek to explain away this delay by arguing that they were not obligated to comply with the provisions of the Act which required the filing of written consents. In support of their position, they cite two Circuit Court decisions, neither of which is controlling for reasons which will be presently noted.

Central Missouri Telephone Co. v. Conwell (8 Cir., 1948), 170 F. 2d 641, is one of the two appellate court cases upon which appellants rely. This litigation involved the claims of two telephone operators, Conwell and Pinkepank, and was the subject of at least three court opinions (74 Fed. Supp. 542; 76 Fed. Supp. 398; and 170 F. 2d 641), from a reading of which can be gleaned an accurate chronology of the litigation and the status of both claimants during all stages of the litigation. Appellants' brief erroneously states that "Miss Conwell had filed the action on behalf of herself and a co-employee 'similarly situated.' The co-employee, Laura Pinkepank, did not appear as party plaintiff in the caption of the complaint, but was so described in the body of the complaint." (App. Op. Br. p. 8.) This statement is misleading. In the words of the trial judge (76 Fed. Supp. 396 at p. 403), "Actually Miss Pinkepank was named both in the caption and in the body of the complaint and throughout the complaint both claimants were consistently referred to as plaintiffs. Miss Pinkepank was named in the original complaint. While the caption recites that the action is brought by 'Lillie Conwell, individually and as representative of Laura Pinkepank,' Miss Pinkepank was in fact a plaintiff in this

action. It is my view that she was 'specifically named as a party plaintiff' at the time the complaint was filed." To similar effect, see the trial court's earlier opinion in 74 Fed. Supp. 542.

Gibbons v. Equitable Life Assurance Society (2 Cir., 1949), 173 F. 2d 337, is the second appellate court decision cited in Appellants' Opening Brief. The facts in the *Gibbons* case were clearly distinguishable from those in the instant case. There, a complaint was filed in October 1944, by Gibbons, suing in his own behalf and as agent and representative of "all employees" similarly situated. The complaint identified eight other employees by name, and alleged that Gibbons had been authorized by them to institute the action in their behalf. Shortly thereafter, and pursuant to stipulation, there were filed amendments to the complaint which in effect stated that Gibbons was suing on behalf of "certain," rather than "all" employees of defendant, followed by allegations which described the services performed by the nine named employees, including Gibbons, but no others. Thus, "long before the passage" of the Portal-to-Portal Act, the complaint as amended identified all parties plaintiff; and with respect to these nine claimants and no others, issues were joined approximately two years prior to the enactment of the Portal-to-Portal Act, so that as of that critical date there was no possibility that additional persons then unidentified would assert claims in the action. This was not the situation which obtained in the instant case as of May 14, 1947. Here, the three persons named as plaintiffs had not indicated, and the defendant had no reliable method for ascertaining which of its many hundreds of employees might ultimately claim to be included within the uninformative descriptive phrase, "employees similarly situated."

Appellants' Opening Brief also cites District Court decisions rendered in the two *Bartels* cases (*Bartels v. Sperti, Inc.* (D. C. S. D., N. Y. 1947), 13 L. C. Par. 63994; 73 Fed. Supp. 751, and *Bartels v. Piel Bros., Inc.* (D. C. E. D., N. Y. 1947), 74 Fed. Supp. 41.) The factual situations in those cases were essentially different from the instant case. There, at the time of filing the complaints and prior to May 14, 1947, the names of all claimants were "set forth in the schedules annexed to the complaints" (73 Fed. Supp. at p. 751), or the "agent-plaintiffs had, and exhibited as part of their complaints, authority in writing from the individual employees to maintain suits in the form prescribed" (74 Fed. Supp. at p. 42).

In all of the foregoing cases cited by appellants, it clearly appears that the "similarly situated" claimants in whose behalf the actions were urged were all identified in pleadings on file in the actions prior to the critical date of May 14, 1947, and had been so treated by the litigants and the court. Obviously, such cases and the declarations of courts with respect thereto must be distinguished from the instant situation where there was no identification of the seven appellants until a date subsequent to May 14, 1947, at which time they became entirely amenable to the "written consent" requirements and other provisions of the Portal-to-Portal Act.

Lockwood v. Hercules Powder Co. (D. C. W. D. Mo. 1948), 78 Fed. Supp. 716 (appeal dismissed, 8 Cir., 1949, 172 F. 2d 775), fully supports appellee's foregoing contention. In that case, there was commenced in August, 1946, a representative action under the Fair Labor Standards Act of 1938, wherein the original complaint contained the name of a single plaintiff who purported to maintain the action on behalf of himself and all other similarly sit-

uated employees of defendant. In March, 1947, pursuant to court order, plaintiff filed a First Amended Complaint in which he named 215 employees on whose behalf he purported to bring the action. On September 9, 1947, in attempting to fulfill the requirements of Section 8 of the Portal-to-Portal Act, a Second Amended Petition was filed. It "contains the names, in the body thereof, of the two hundred fifteen (215) employees above referred to, and with respect to them plaintiff alleges that 'he has been specifically authorized to act and does bring this action not only for himself, but for' their benefit." The court pointed out that "Plaintiff does not allege that each such claimant has executed a 'written consent' to become a party plaintiff in this action, and no such 'written consent' has been filed herein by or on behalf of any of said employees." In ordering the claims of all these similarly situated employees dismissed, the court stated that Section 8 of the Portal-to-Portal Act "makes a condition precedent to the continued maintenance of such action on behalf of other employees the filing in Court of the 'written consent' there required. Failure to file such 'written consent' bars further maintenance and prosecution of representative actions * * * on behalf of employees not named as plaintiffs."

It is noteworthy that the *Lockwood* case is much stronger from the viewpoint of the employees' claims than is the instant case, for in that case the names of the 215 employees appeared in the Second Amended Petition which was on file with the court approximately two months prior to the enactment of the Portal-to-Portal Act, whereas, in the instant case the appellants' names first appeared in a bill of particulars filed June 5, 1947. In effect, the court in the *Lockwood* case held that the naming of the numerous employees in the body of the Second Amended

Petition did not constitute them "plaintiffs" within the meaning of the Portal-to-Portal Act, so that after passage of the Act they became amenable to the "written consent" requirements of Section 8, and having failed to comply therewith within the allowed period of time, their claims were properly dismissible. For like reasons, the claims of the seven appellants herein were properly dismissed.

3. Appellants' Claims Were Dismissible for Want of Jurisdictional Allegations in the Amended Complaint.

The trial court's order of dismissal as to the seven appellants is supportable on the alternative ground that neither the original complaint nor the amended complaint contains sufficient allegations anent the jurisdiction of the court to state a claim for relief.

Recently, in a comparable case, this Court upheld an order dismissing an amended complaint, basing its decision upon the failure of the amended complaint to plead the jurisdictional elements required by the Portal-to-Portal Act, even though such ground of infirmity had not been suggested to or considered by the District Court. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, 434, 436.)

In the present case, the original plaintiffs probably, and quite understandably, did not anticipate in January, 1947, the requirements of the Portal-to-Portal Act which would become applicable to the litigation as it progressed in the trial court, and consequently no attempt whatever was made in the original complaint to allege that the services for which compensation was claimed were performed pursuant to custom or written or oral contract.. However,

the amended complaint was definitely prepared with the Portal-to-Portal Act requirements in mind. Paragraph VIII of the amended complaint [Tr. p. 23] alleges as follows:

“The activities which the plaintiffs and said other employees similarly situated performed during each of said one-half ($\frac{1}{2}$) hours each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947 by virtue of and in accordance with the express provision of a written collective bargaining agreement then in effect between the plaintiffs, their collective bargaining representatives and the defendant.”

The foregoing allegations obviously paraphrase the statutory language contained in Section 2(a) (1) and (2) of the Portal-to-Portal Act (29 U. S. C., §252(a) (1) and (2)). Nevertheless, it is the view of a majority of federal courts which have considered the question that such allegations are insufficient to show the jurisdiction of the District Court.

An identical situation was presented in *Story v. Todd Houston S. Corp.* (D. C. S. D. Tex., 1947), 72 Fed. Supp. 690, where the Court stated (p. 694):

“While they plead a written contract they do not plead an express provision thereof showing such liability. Under the Portal-to-Portal Act of 1947 this court no longer has jurisdiction of this case.”

A comparable situation also arose in *Coyle v. Philadelphia Macaroni Co.* (D. C. E. D. Pa., 1949), 9 F. R. D. 331. There, the Court ruled upon the sufficiency of the complaints in four actions which contained substantially identi-

cal allegations. The Court said (9 F. R. D. at pp. 333-334):

"In so far as the actions seek to enforce liability for activities engaged in prior to May 14, 1947, the averments of the amended complaints do not set forth sufficient facts to permit this court to take jurisdiction over the subject matter. The failure to assert, as in paragraphs VII and IX of the complaints, that the specific provisions of a contract and that the activities involved were compensable by those provisions, or facts from which a custom or practice to compensate may be inferred is fatal to the complaint. *Sinclair v. United States Gypsum Co.*, D. C. W. D. N. Y., 81 F. Supp. 365; *Hays v. Hercules Powder Co.*, D. C. Mo., 7 F. R. D. 747. Allegations, as in paragraphs VIII of the complaints, merely couched in or paraphrased in the language of the Portal-to-Portal Act will not suffice. *Sadler v. W. S. Dickey Clay Manufacturing Company*, D. C. W. D. Mo., 78 F. Supp. 616. Also see *Hutchings v. Lando*, D. C. S. D. N. Y., 83 F. Supp. 615; *Smith v. Cudahy Packing Co.*, D. C. Minn., 76 F. Supp. 575; *Borucki v. Continental Baking Co.*, D. C. N. Y., 74 F. Supp. 815; *Moeller v. Eastern Gas & Fuel Associates*, D. C. Mass., 74 F. Supp. 937."

In *Hutchings v. Lando* (D. C. S. D. N. Y., 1949), 83 Fed. Supp. 615, the Court held a complaint substantially identical to the present one to be insufficient for the following reasons (83 Fed. Supp. at p. 616):

"A general allegation in the language of the statute that activities were compensable under an express provision of the contract, without setting forth the contract or particular provision thereof or facts in support of such allegation is insufficient to cure the

jurisdictional defect. *Smith v. Cudahy Packing Company*, D. C., 76 F. Supp. 575; *Sadler v. W. S. Dickey Clay Manufacturing Co.*, D. C., 78 F. Supp. 616; *Johnson v. Park City Consolidated Mines Company*, D. C., 73 F. Supp. 852, cited with approval in *Battaglia v. General Motors Corporation*, *supra* [2 Cir., 169 F. 2d 254]; *Story v. Todd Houston Shipbuilding Corporation*, D. C., 72 F. Supp. 690, cited with approval in *Battaglia v. General Motors Corporation*, *supra*."

To like effect see:

Tipton v. Bearl Sprott Co. (9 Cir., 1949), 175 F. 2d 432, 436;

Newson v. E. I. DuPont de Nemours & Co. (6 Cir., 1949), 173 F. 2d 856;

Bumpus v. Remington Arms Co. (W. D. Mo., 1948), 77 Fed. Supp. 94, 97.

Also see:

Bonner v. Elizabeth Arden, Inc. (2 Cir., 1949), 179 F. 2d 703, which affirmed D. C. S. D. N. Y., 80 Fed. Supp. 243.

Cf. Manosky v. Bethlehem Hingham S. Corp. (D. C. Mass., 1938), 16 Labor Cases, par. 64895; *Idem.* (D. C. Mass., 1949), 16 Labor Cases, par. 65045, which also is to like effect. Although the Court of Appeals recently reversed with one judge dissenting (1 Cir., 1949), 17 Labor Cases, par. 65412, the majority opinion appears irreconcilable with this Court's opinion in *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432.

In light of the fact that the claimants in this action were accorded full opportunity to file an amended com-

plaint for the primary purpose of indicating to the trial court its jurisdiction of their claims, and the fact that they have failed to satisfactorily make such a showing in the amended complaint which they filed April 6, 1949, their claims were properly dismissible on that ground, which was one of several grounds urged by appellee in the court below as a basis for dismissal.

Conclusion.

In the event this Court should be disposed in the instant case to liberally construe the Portal-to-Portal Act in a manner sympathetic to appellants' contentions, it should be deterred from so doing out of respect for the forcefully clear statement of legislative "Findings and Policy" contained in Part I, Section 1, of the Portal-to-Portal Act. The Congressional statement, a full reading of which is recommended, points up the serious and unjust results which followed from the unduly liberal judicial interpretations of the Fair Labor Standards Act. In part, Congress stated as follows:

"(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers * * *."

Just recently, in *Lassiter v. Guy F. Atkinson Co.* (9 Cir., 1949), 176 F. 2d 984, at page 993, this court expressed recognition that the Portal-to-Portal Act "is remedial legislation and it must be interpreted with this in mind lest we do violence to the intent of Congress."

For the reasons indicated in this brief, appellee contends that the present appeal should be dismissed. Alternatively, if the Court elects to consider the appeal upon its merits, appellee submits that the District Court's order dismissing the claims of the seven appellants should be affirmed.

Respectfully submitted,

ALFRED WRIGHT and

HAROLD F. COLLINS,

Attorneys for Appellee.

Journal of Management Inquiry

No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.

MOHR & BORSTEIN,
719 Park Central Building, Los Angeles 14,

PERRY BERTRAM,
744 Occidental Life Building, Los Angeles 15,
Attorneys for Appellants and Cross-Appellees.

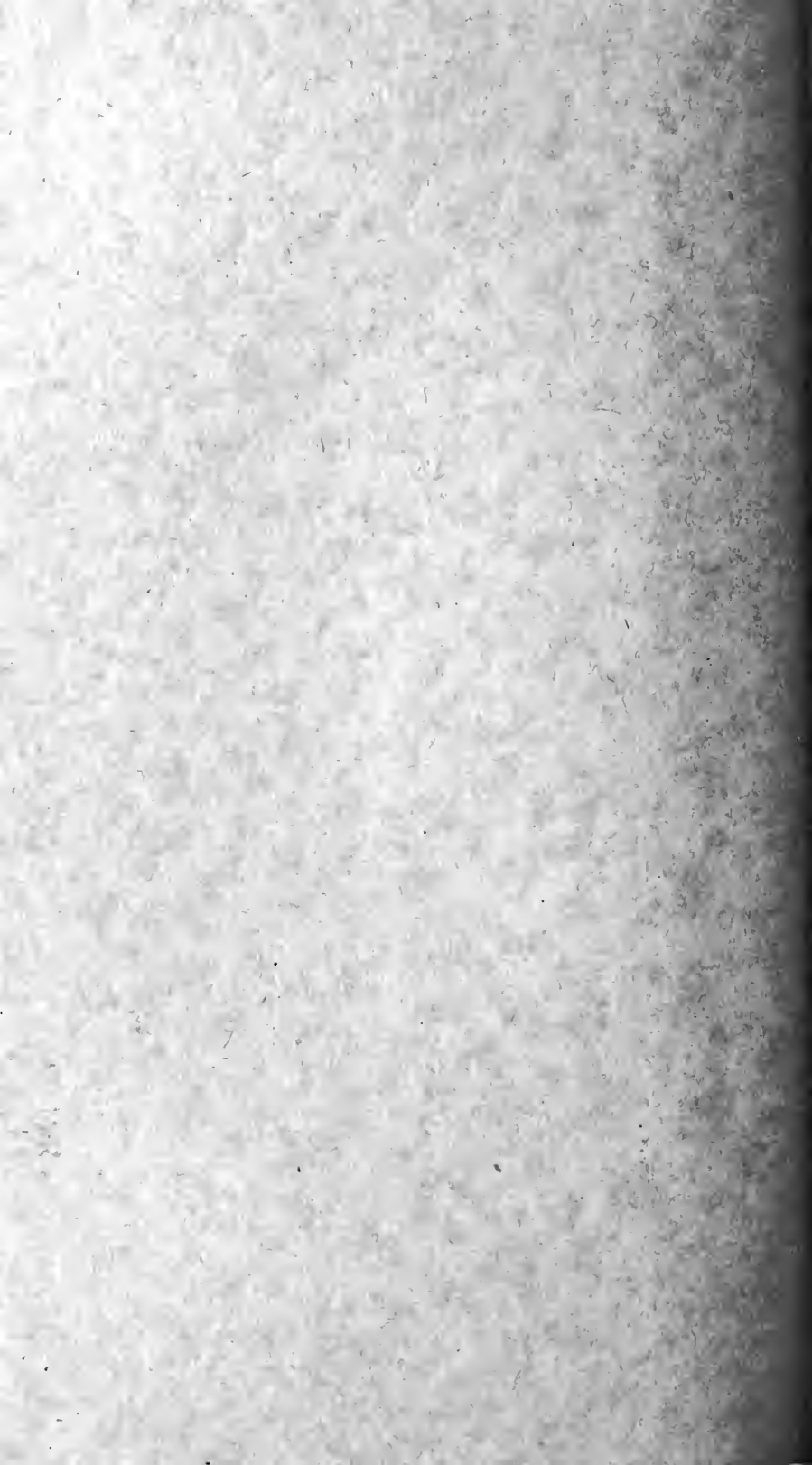
FILED

JAN 30 1950

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

PAUL P. O'BRIEN,

CLERK



TOPICAL INDEX

PAGE

1. The order appealed from is a final judgment of dismissal as to each of the employees referred to therein and, therefore, is appealable as a "final decision"	1
2. Appellants have complied with all of the requirements of the Portal-to-Portal Act, applicable to them.....	3
3. The amended complaint sufficiently stated the jurisdictional allegations required by the Portal-to-Portal Act of 1947.....	5
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bonner v. Elizabeth Arden, Inc., 177 F. 2d 703.....	5
Borucki v. Continental Baking Co., 74 Fed. Supp. 815.....	5
Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641.....	4, 6, 7
Coyle v. Philadelphia Macaroni Co., 9 F. R. D. 331.....	6
Frank v. Wilson & Co., 172 F. 2d 712.....	7
Gibbons v. Equitable Life Assurance Soc., 173 F. 2d 337.....	2, 4
Hays v. Hercules Powder Co., 7 F. R. D. 747.....	5
Hutchings v. Lando, 83 Fed. Supp. 615.....	6
Johnson v. Park City Consolidated Mines Company, 73 Fed. Supp. 852	5
Lockwood v. Hercules Powder Co., 78 F. Supp. 716.....	4
Manosky v. Bethlehem Hingham S. Corp. (C. A. 1, 1949).....	7
Markert v. Swift & Co., Inc., 173 F. 2d 517.....	2
Mills v. Joshua Hendy Corp., 169 F. 2d 898.....	7
Moeller v. Eastern Gas & Fuel Associates, 74 Fed. Supp. 937....	5
Newson v. E. I. DuPont de Nemours & Co., 173 F. 2d 856....	6
Sadler v. W. S. Dickey Clay Manufacturing Company, 78 Fed. Supp. 616	6
Sinclair v. United States Gypsum Co., 81 Fed. Supp. 365.....	5
Smith v. Cudahy Packing Co., 76 Fed. Supp. 575.....	6
Story v. Todd Houston S. Corp., 72 Fed. Supp. 690.....	5
Tipton v. Bearl Sprott Co., 175 F. 2d 432.....	5

MISCELLANEOUS

United States Dept. of Justice Circular No. 4013, Supp. 1, Jan. 28, 1948.....	3
--	---

STATUTES

Federal Rules of Civil Procedure, Rule 86(b).....	3
---	---

No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLANTS' REPLY BRIEF.

1. The Order Appealed From Is a Final Judgment of Dismissal as to Each of the Employees Referred to Therein and, Therefore, Is Appealable as a "Final Decision."

As pointed out in Appellants' Opening Brief, the claim of each of the employees is separate and distinct from that of the other employees who are joined in the action.

Thus, when the claim of any single employee is dismissed, and a Judgment of Dismissal entered as to him, that judgment is a final decision from which the employee

affected is entitled to appeal. This precise point was considered and so determined by the United States Court of Appeals for the Second Circuit, in *Gibbons v. Equitable Life Assurance Soc.* (1949), 173 F. 2d 337.

Any contrary holding would place the appellants in the precise position in which the court in *Markert v. Swift & Co., Inc.* (C. A. 2d, 1949), 173 F. 2d 517, held they may not be placed¹:

“It is clear that these orders, particularly the latter one, both close and seal the door of the federal court to any claim for relief of these plaintiffs under the Fair Labor Standards Act for the grievances asserted. Unless they can now obtain review, they never will have appellate examination of their contention that they are entitled to overtime compensation within the very provisions of the Portal-to-Portal Act itself. Thus it is hard to conceive of a more final (and hence reviewable) judicial action as affecting their asserted rights.”

¹The holding itself did not involve the precise point now before the Court, but the situation described by the quoted language is pertinent.

2. **Appellants Have Complied With All of the Requirements of the Portal-to-Portal Act, Applicable to Them.**

It is appellants' contention that each of them was expressly named as a party plaintiff by the filing of the original Complaint, as supplemented by the Bill of Particulars filed on June 5, 1947. Appellee suggests that the question as to the function of the Bill of Particulars is academic in view of the Amendments to Rule 12(e) which deleted references to the Bill of Particulars. It must, however, be borne in mind that these Amendments did not become effective until March 19, 1948.

Federal Rules of Civil Procedure, as amended, Rule 86(b).

See:

U. S. Dept. of Justice Circular No. 4013, Supp. 1, January 28, 1948.

Therefore, at the time appellee moved for an order for a Bill of Particulars, at the time the order was granted, and at the time the Bill of Particulars was filed, Rule 12 (e) provided for a Bill of Particulars and its function in the case is that described by appellants in their Opening Brief, that is, it amends and becomes a part of the original Complaint.

Appellee urges that the provisions of Section 8 required the appellants to file written consents. Its argument, together with its attempt to distinguish cases holding the

contrary, is based upon the assumption that May 14, 1947, is "the critical date." By the express language of Section 8, however, May 14, 1947, is simply the commencement of the 120-day period in which the appellants might be *named*. Filing of written consents is then required only of such plaintiffs as are *not* named within the 120-day period.

Gibbons v. Equitable Life Assurance Soc. (C. A. 2d, 1949), 173 F. 2d 337.

Each of the appellants was specifically named as a party plaintiff on June 5, 1947. Accordingly, none of them was required to file written consents.

In support of its contention, appellee relies upon *Lockwood v. Hercules Powder Co.* (W. D. Mo. 1948), 78 F. Supp. 716. This case was decided February 16, 1948. Subsequently, the United States Court of Appeals for the Eighth Circuit, reached the opposite conclusion in *Central Missouri Telephone Co. v. Conwell* (Nov. 16, 1948), 170 F. 2d 641. This decision being controlling upon the District Court for the Western District of Missouri, the decision in *Lockwood v. Hercules Powder Co.* can no longer be said to represent the law even in that District.

3. **The Amended Complaint Sufficiently Stated the Jurisdictional Allegations Required by the Portal-to-Portal Act of 1947.**

The Court below considered and ruled adversely to appellee's contention that the Amended Complaint did not allege facts establishing the jurisdiction of the Court, the motion to dismiss on this ground having been denied as to the three originally named plaintiffs [Tr. pp. 38-39].

In the following cases, relied upon by appellee, there were no allegations whatsoever, as there are here, that the activities for which compensation was sought were compensable by reason of an express provision of a contract or by custom or practice in the establishment.

Tipton v. Bearl Sprott Co. (C. A. 9, 1949), 175 F. 2d 432;

Bonner v. Elizabeth Arden, Inc. (C. A. 2, 1949), 177 F. 2d 703;

Story v. Todd Houston S. Corp. (S. D. Tex., 1947), 72 F. Supp. 690.

The same is true of the following cases cited in the portions of opinions quoted by appellee:

Sinclair v. United States Gypsum Co. (W. D. N. Y.), 81 F. Supp. 365;

Hays v. Hercules Powder Co. (D. C. Mo.), 7 F. R. D. 747;

Borucki v. Continental Baking Co. (D. C. N. Y.), 74 F. Supp. 815;

Moeller v. Eastern Gas & Fuel Associates (D. C. Mass.), 74 F. Supp. 937;

Johnson v. Park City Consolidated Mines Company (D. C.), 73 F. Supp. 852.

There remains then the following authorities which at first blush appear to support appellee's argument:

Newson v. E. I. DuPont de Nemours & Co. (C. A. 6, 1949), 173 F. 2d 856;

Coyle v. Philadelphia Macaroni Co. (E. D. Pa., 1949), 9 F. R. D. 331;

Sadler v. W. S. Dickey Clay Manufacturing Company (W. D. Mo.), 78 F. Supp. 616;

Smith v. Cudahy Packing Co. (D. C. Minn.), 76 F. Supp. 575;

Hutchings v. Lando (S. D., N. Y., 1949), 83 F. Supp. 615.

Central Mo. Tel. Co. v. Conzwell (C. A. 8, 1948), 170 F. 2d 641, supersedes anything to the contrary in the cases of *Sadler v. W. S. Dickey Clay Manufacturing Company* and *Smith v. Cudahy Packing Company*.

An examination of the three cases remaining, as well as the two superseded, reveals that the complaints held to be defective expressly described the activities upon which the claims were based as "portal" type activities, that is, activities of the type involved in the *Mt. Clemens Pottery Co.* case. Where such express allegations raise doubt as to jurisdiction, there may be said to be some justification for requiring additional allegations to show that the contract, custom or usage referred to contemplated compensation for the portal type activities described in the Complaint.

It is respectfully submitted that the better view is represented by the decisions of the Courts of Appeal in the following cases:

Central Missouri Telephone Co. v. Conwell (C. A. 8, 1948), 170 F. 2d 641;

Frank v. Wilson & Co. (C. A. 7, 1949), 172 F. 2d 712;

Manosky v. Bethlehem Hingham S. Corp. (C. A. 1, 1949).

Although the sufficiency of the pleadings was not there involved, the decision of this Court in *Mills v. Joshua Hendy Corp.* (C. A. 9, 1948), 169 F. 2d 898, supports the views here reached. The Court there held that the precise activities for which compensation is here sought were compensable under the express provisions of a contract identical to that here involved. In this connection, it is to be borne in mind that in the case at bar the sufficiency of the jurisdictional allegations was upheld by the trial court at a time following pre-trial procedure when the collective bargaining contract was identified by stipulation as Plaintiff's Exhibit 1 [Tr. p. 28]. Under these circumstances, and in the light of the decision in *Mills v. Joshua Hendy Corp.*, the soundness of the trial court's order in holding the Complaint to be sufficient, appears unassailable.

Conclusion.

It is respectfully submitted, therefore, that the order appealed from is a Final Judgment as to each of these appellants, that Section 8 did not require any of the appellants to file written consents to become parties plaintiff, and that jurisdiction was properly and sufficiently alleged. Accordingly, the order dismissing the Complaint as to these employees should be reversed.

Respectfully submitted,

MOHR & BORSTEIN and
PERRY BERTRAM,

By PERRY BERTRAM,

Attorneys for Appellants and Cross-Appellees.

No. 12,362

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

M. L. TOWNSEND,

Respondent.

PETITION FOR REHEARING.

FINDLAY A. CARTER,

FREDERICK A. POTRUCH,

CARTER & POTRUCH,

JAMES M. NICOSON,

520 Story Building, Los Angeles 14,

Attorneys for Respondent.

FILED

OCT - 2 1950

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

PAUL P. O'BRIEN,

CLERK

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bell-Wyman Company, 79 NLRB 1424.....	4
Harry's Cadillac-Pontiac Company, 81 NLRB 1.....	4
Hudson Sales case, 77 NLRB 378.....	4
Liddon-White Truck Co., 76 NLRB 1181.....	4
Midtown Motors, 89 NLRB 1679.....	4
Mogul Trans. Co. v. Larison, Ore., 181 P. 2d 139.....	5
National Labor Relations Board v. Shawnee Milling Company, F. 2d, 25 LRRM 2462.....	5
Valley Truck and Trailer Co., 80 NLRB 444.....	4
Vincent v. United States, A. 2d 829.....	5
Wyoming Coal Co. v. Krug, 172 F. 2d	5

STATUTES

Administrative Procedure Act, Sec. 8(a) (60 Stat. 237).....	2, 3
Administrative Procedure Act, Sec. 8(b) (60 Stat. 237).....	2
National Labor Relations Act, Sec. 9(d).....	3
National Labor Relations Act, Sec. 10(c) (29 U. S. C. A., Sec. 160(c))	2, 3
National Labor Relations Act, Sec. 10(e) (29 U. S. C. A., Sec. 160(e))	4
National Labor Relations Board Regulation 203.46.....	5
49 Statutes at Large, p. 501.....	5
United States Code Annotated, Title 29, Sec. 159(d).....	4
United States Code Annotated, Title 44, Sec. 305.....	5

No. 12,362
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

M. L. TOWNSEND,

Respondent.

PETITION FOR REHEARING.

Comes now M. L. Townsend, respondent in the above entitled matter and respectfully petitions the Court to set aside its opinion heretofore issued on September 11, 1950, and to grant a new hearing in this matter and as reasons therefore respectfully shows:

I.

That the aforementioned opinion, issued September 11, 1950, granted a petition of the National Labor Relations Board to enforce an order previously entered by that body against the respondent here.

II.

The Court in reaching its decision and entering its opinion appears to have overlooked or given improper con-

sideration to a determinative factor and point of law.¹ After the Trial Examiner issued his Intermediate Report in which it was found that the Board did not have jurisdiction over this respondent, pertinent provisions of Section 10 (c) of the National Labor Relations Act (29 U. S. C. A., Sec. 160(c)), became operative and dispositive of the entire matter. In part. Section 10(c) is as follows:

“ . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order *shall* become the order of the Board and become effective as therein prescribed.” (Emphasis supplied.)

Section 8(a) and (b) of the Administrative Procedure Act, 60 Stat. 237, is to the same effect.^{2 3}

The record reveals and the Board admits that the General Counsel did not file exceptions to the Intermediate Report of the Trial Examiner [I. R. 1-5] and hence the quoted portion of Section 10(c) became operative and conclusively disposes of this whole case. The position that

¹For the convenience of the court and counsel, Respondent in his references to the findings and proceedings will use the **same** designations as used by the Board in its brief, *i.e.*, Intermediate Report as I. R.; Decision and Order Remanding Case to Trial Examiner as D.; Supplemental Intermediate Report as S. I. R.; and the Order of the Board as O.

²The Board did not issue proposed findings as required by the Administrative Procedure Act.

³See appendix, page 5, Respondent's brief herein.

the Board is bound to obey the statutory mandate cannot be successfully challenged and the Board must perform its functions according to the mandates of law. Since no exceptions were filed to the Intermediate Report and Recommended Order, by the General Counsel or any other party, such Intermediate Report and Recommended Order became, by operation of law, the Order of the Board and the Board is and was compelled by the statute to enter the Trial Examiner's Intermediate Report and Recommended Order as the Order of the Board.

This mandated duty is not only provided for in the National Labor Relations Act (Sec. 10(c)), it is also required by Section 8(a) of the Administrative Procedure Act (see above). This latter statute provides that where the initial decision is made by a subordinate officer and there is *no appeal* from it "*such decision shall, without further proceedings, become the decision of the agency.*"

It is therefore respectfully suggested that since the General Counsel did not file exceptions the Board was mandated by both of these statutes to enter the Intermediate Report as the Order of the Board and hence the case should have been dismissed in accordance with the Intermediate Report.

III.

The decision of the majority and its opinion is based upon a record which does not comply with the statutory requirements.

Section 9(d) of the National Labor Relations Act, as amended, provides:

"Whenever an order of the Board is made pursuant to Section 10(c) it is based in whole or in part upon

facts certified following an investigation pursuant to Subsection (c) of this Section and there is a petition for the enforcement or review of such order, *such certification and the record of such investigation shall be included in the transcript* of the entire record required to be filed under Section 10(e) and 10(f), and thereupon the decree of the Court enforcing, modifying or setting aside, in whole or in part the Order of the Board, shall be made and entered upon the *pleadings, testimony, and proceedings set forth in such transcript.*" (29 U. S. C. A., Sec. 159(d).) (Emphasis supplied.)

The record before the Court reveals that no transcript of the *Hudson Sales* case, 77 NLRB 378, has been included as part of the record submitted by the Board to the Court in pursuance to Section 10(e) of the National Labor Relations Act and hence the Court has acted without a full transcript before it and without a record which complies with the provisions of Section 10(e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 (e).)

IV.

The majority denies respondent's contention of equal protection of the law by resort to citations of *Liddon-White Truck Co.*, 76 NLRB 1181; *Bell-Wyman Company*, 79 NLRB 1424; *Harry's Cadillac-Pontiac Company*, 81 NLRB 1; *Midtown Motors*, 89 NLRB 1679; *Valley Truck and Trailer Co.*, 80 NLRB 444. Examination of these cited cases shows clearly that the companies involved in those cases had true receipts of shipments across state lines and not exclusively through local sources. In the instant case respondent received nothing from out of state and only its purchases, through the medium of the Hud-

son Sales Corporation, is an inconclusive connection with interstate commerce [I. R. 2-4]. Since this case was submitted, the Court of Appeals for the Tenth Circuit has issued a decision in *NLRB v. Shawnee Milling Company*, F. 2d 25 LRRM 2462 (dec. August 4, 1950), in which it clearly states that even though a company by its aggregate business may be said to effect commerce unless there is a separate showing that a local plant of such empire has a commerce connection, the Board is without right to exercise jurisdiction over the latter operation.

V.

The majority opinion seems to rest in part its decisive functions on the Board's alleged notification that respondent might file exceptions under the Board's Regulation 203.46 [D. 1-2]. With respect to the Board's attempt to require respondent to file exceptions to the "doubtful process of jurisdictional notice," it, in effect, promulgated a rule of procedure for this case only. Examination of the Board Regulation 203.46 conclusively shows that the application of that rule is only to Intermediate Reports of the Trial Examiner and not such situations as the Board has here invoked. Before the Board can promulgate and put into effect a rule it must first publish it in the Federal Register after having given opportunity to the public to contest such rules' entry.⁴ None of that was done in this case and hence the Board's attempt to require the respondent to except to its administrative judicial notice procedure is without force and effect and respondent could and did completely disregard it and should not

⁴49 Stat. 501; 44 U. S. C. A. 305; *Wyoming Coal Co. v. Krug*, 172 F. 2d; *Vincent v. U. S.*, A. 2d 829; *Mogul Trans. Co. v. Larison*, Ore., 181 P. 2d 139.

now be held responsible for the inconclusive and unauthorized rule which the Board has specially promulgated for the government of this particular case.

Wherefore, respondent prays that the opinion of the majority be set aside, that the Court grant a further hearing in the matter and for such other and proper relief as to the Court seems just and proper.

Respectfully submitted,

FINDLAY A. CARTER,
FREDERICK A. POTRUCH,
CARTER & POTRUCH,
JAMES M. NICOSON,

Attorneys for Respondent.

Certificate of Counsel.

James M. Nicoson respectfully certifies that he is one of the attorneys for respondent herein, that in his judgment the aforementioned Petition for Rehearing is well founded and that it is not proposed for the purpose of delay.

JAMES M. NICOSON,

Attorney for Respondent.

No. 12368

United States
Court of Appeals
For the Ninth Circuit.

CLARK SQUIRE, United States Inspector of Internal Revenue for the State of Washington,
Appellant,

vs.

PUGET SOUND PULP & TIMBER CO.,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

JAN 4 1950

PAUL P. O'BRIEN,
CLERK

No. 12368

**United States
Court of Appeals
For the Ninth Circuit.**

**CLARK SQUIRE, United States Inspector of Internal Revenue for the State of Washington,
Appellant,**

vs.

**PUGET SOUND PULP & TIMBER CO.,
Appellee.**

Transcript of Record

**Appeal from the United States District Court,
Western District of Washington,
Northern Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer	19
Certificate of Clerk U. S. District Court to Record on Appeal.....	111
Complaint	2
Exhibit A—Letter Dated Nov. 29, 1944....	10
B—Claim	12
C—Letter Dated March 21, 1945..	15
Court's Oral Decision.....	83
Designation of Contents of Record on Appeal..	108
Exhibit, Defendant's:	
A—Certified Copy of Claim.....	47
Exhibits, Plaintiff's:	
No. 1—Statement of Income Tax Due....	40
2—Statement of Income Tax Due— Second Notice.....	41

INDEX	PAGE
Findings of Fact and Conclusions of Law.....	99
Conclusions of Law.....	102
Findings of Fact.....	99
Hearings for Perpetuation of Testimony.....	28
Judgment	105
Memorandum of Costs and Disbursements....	97
Motion to Place on the Trial Calendar.....	27
Names and Addresses of Counsel.....	1
Notice of Appeal.....	107
Notice of Hearing.....	27
Order Extending Time to Feb. 15, 1947, to Plead	19
Order Striking Cause From Trial Calendar...	25
Order Transferring Cause to Northern Division	26
Order Transmitting Original Exhibits as Part of Record on Appeal.....	110
Statement of Point Upon Which Appellant In- tends to Rely and Designation of the Record to Be Printed.....	114
Stipulation Extending Time for Assignment of Cause Until Called for Settling by Counsel	24
Stipulation Extending Time to Feb. 15, 1947, to Plead.....	18

INDEX

PAGE

Stipulation Re Designation of Portions of Record to Be Printed..... 115

Stipulation Transmitting Original Exhibits as Part of Record on Appeal..... 109

Summons 17

Witness, Plaintiff's:

Turcotte, Lawson P.

—direct 34

—cross 37

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS,
United States Attorney,
1017 U. S. Court House,
Seattle 4, Washington,
Attorney for Appellant.

THOMAS R. WINTER,
Special Assistant to the Chief Counsel,
Bureau of Internal Revenue,
713 Smith Tower,
Seattle 4, Washington,
Attorney for Appellant.

ROBERT H. EVANS OF
EVANS, McLAREN, LANE,
POWELL & BEEKS,
1111 Dexter Horton Building,
Seattle 4, Washington,
Attorneys for Appellee.

In the District Court of the United States in and
for the Western District of Washington

No. 951

PUGET SOUND PULP & TIMBER CO.,
Plaintiff.

vs.

CLARK SQUIRE, United States Collector of In-
ternal Revenue for the State of Washington,
Defendant.

COMPLAINT

For the Recovery of Interest Erroneously and
Illegally Assessed and Collected

Comes now the plaintiff, complains of the de-
fendant and for cause of action alleges:

I.

This action arises under the Internal Revenue Laws of the United States and is brought pursuant to the provisions of Section 24 of the Judicial Code, U. S. C. Title 28, Section 41(5) for the recovery of interest erroneously and illegally assessed against and collected from plaintiff as hereinafter more fully appears.

II.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Its principal place of business is in the City of Bellingham, State of Washington and in the Western District of Washington.

III.

Defendant now is and at all times since the 6th day of March, 1941, has been, the duly appointed, qualified and acting United States Collector of Internal Revenue in the State of Washington and is a resident of the Western District of Washington. Defendant is the person to whom the interest herein sought to be recovered was paid.

IV.

On or about the 15th day of May, 1943, plaintiff duly filed its corporation excess profits tax return with defendant as Collector of Internal Revenue. Said return disclosed adjusted excess profits net income for the year 1942 (computed without reference to Section 722 of the Internal Revenue Code) in the amount of \$2,584,101.85. Plaintiff's normal tax net income for the year 1942 computed without the credit provided in Section 26(e) of the Internal Revenue Code, as reported on said return was \$2,553,133.02. On its excess profits tax return for the year 1942, plaintiff claimed the benefits of Section 722 of the Internal Revenue Code in accordance with the regulations prescribed by the Commissioner of Internal Revenue with the approval of Secretary of the Treasury. The reduction in excess profits tax for the year 1942 claimed by plaintiff under Section 722 of the Internal Revenue Code was \$409,707.16.

V.

As plaintiff's adjusted excess profits net income for the year 1942 (computed without reference to

Section 722 of the Internal Revenue Code) exceeded 50 per centum of plaintiff's normal tax net income for said year, computed without the credit provided in Section 26(e) of the Internal Revenue Code and plaintiff claimed the benefits of Section 722 of the Internal Revenue Code in its excess profits tax return for the year 1942, under the provisions of Section 710(a)(5) of the Internal Revenue Code, plaintiff was entitled to reduce the amount of excess profits tax payable at the time prescribed for payment by an amount equal to 33 per centum of the said sum of \$409,707.16. Plaintiff elected to reduce the amount of excess profits tax computed without the benefit of Section 710(a)(5) of the Internal Revenue Code by the amount of \$135,203.36 as provided in Section 710(a)(5) of the Internal Revenue Code.

VI.

During the year 1942, plaintiff retired indebtedness in the amount of \$375,000. Under the provisions of Section 783 of the Internal Revenue Code, plaintiff was entitled to a credit against its excess profits tax for the year 1942 in the amount of 40 per centum of the indebtedness retired or to wit, \$150,000. In its excess profits tax return for the year 1942, plaintiff elected to take the credit allowed by Section 783 of the Internal Revenue Code for the retirement of indebtedness and took said credit in the amount of \$150,000. After the deduction of said sum of \$135,203.36 pursuant to the provisions of Section 710(a)(5) of the Internal

Revenue Code and the deduction of said credit in the amount of \$150,000 for the retirement of indebtedness the excess profits tax disclosed by the return and payable at the time prescribed for payment was \$1,410,924.79.

VII.

Said excess profits tax liability for the year 1942 in the amount of \$1,410,924.79 was duly paid by plaintiff to defendant as Collector of Internal Revenue in installments during the year 1943 at the times and in the manner provided by law.

VIII.

Plaintiff's profits for the year 1942 were renegotiated and as the result thereof, plaintiff's excess profits tax for the year 1942 was reduced by the amount \$119,492.48 so that plaintiff's excess profits tax liability for the year 1942 computed upon the income reported in its return for said year adjusted for renegotiation was \$1,291,432.31.

IX.

Thereafter on August 29, 1944, the Commissioner of Internal Revenue determined that plaintiff was not entitled to relief under the provisions of Section 722 of the Internal Revenue Code, rejected plaintiff's claim for relief under said Section 722 for the year 1942 and assessed against plaintiff for the year 1942, additional excess profits taxes which included the sum of \$135,203.36, the amount by which

said tax had been reduced in accordance with Section 710 (a)(5) of the Internal Revenue Code.

X.

Thereafter, pursuant to the assessment of said additional tax, defendant as Collector of Internal Revenue demanded that plaintiff pay said additional tax and further demanded that plaintiff pay interest thereon at the rate of 6 per centum per annum from March 15, 1943 to the date of payment thereof. On October 13, 1944, plaintiff paid to defendant pursuant to his demand the sum of \$194,596.26 in payment of said taxes and interest thereon. Said sum included interest on said \$135,203.36 in the amount of \$405.80 for the period from August 29, 1944 to October 13, 1944. Thereafter defendant made a further demand for interest on said \$135,203.36 at the rate of 6 per centum per annum from March 15, 1943. On November 30, 1944, pursuant to said demand of defendant, plaintiff paid additional interest on said sum of \$135,203.36 for the period from March 15, 1943 to November 30, 1944 in the amount of \$11,880.12. Said payment was made under written protest. A true and correct copy of said protest is attached hereto marked Exhibit A and is hereby referred to and by this reference made a part hereof the same as though fully set forth herein.

XI.

Said interest in the amount of \$11,880.12 collected from plaintiff as aforesaid was assessed and

collected for the period from March 15, 1943 to November 29, 1944 on the sum of \$135,203.36, payment of which was deferred in accordance with and under authority of the provision of Section 710(a)(5) of the Internal Revenue Code. Under the provisions of said Section 710(a)(5) of the Internal Revenue Code said \$135,203.36 was not payable on March 15, 1943 and did not become payable until plaintiff's claim for relief under Section 722 of the Internal Revenue Code was rejected and payment of said deferred portion of the tax was demanded. Said sum of \$135,203.36 did not become payable prior to August 29, 1944 and no payment of said sum was demanded of plaintiff until after August 29, 1944. Under the provisions of Section 292 of the Internal Revenue Code interest was payable on said sum of \$135,203.36 only from and after the date prescribed for payment thereof. There is no provision in the law which prescribes a specific date or dates for the payments of such sums and the date prescribed for payment within the meaning of Section 292 of the Internal Revenue Code could not precede the date said sum became payable as the result of the rejection of the claim for relief under Section 722 of the Internal Revenue Code and the demand for payment of said deferred portion of the tax.

XII.

The assessment and collection of interest upon said sum of \$135,203.36 for any period prior to August 29, 1944 was erroneous and illegal and was

contrary to and in direct violation of the laws of the United States and particularly, the provisions of Sections 710(a)(5) and 292 of the Internal Revenue Code.

XIII.

On November 30, 1944, plaintiff duly filed its claim for refund of said interest in the amount of \$11,880.12 erroneously and illegally assessed and collected as aforesaid. Said claim for refund was made and filed with defendant as Collector of Internal Revenue in accordance with the provisions of the law and the regulations established in pursuance thereof, and alleged therein the same facts and grounds hereinbefore alleged and herein relied upon. A true and correct copy of said claim is attached hereto marked Exhibit B and is hereby referred to and by this reference made a part hereof the same as though fully set forth herein. On March 21, 1945, the Commissioner of Internal Revenue rejected said claim. A true and correct copy of the rejection letter received by plaintiff from the Commissioner of Internal Revenue is attached hereto marked Exhibit C and hereby made a part hereof.

XIV.

No part of said interest in the amount of \$11,880.12 has never been repaid or refunded to plaintiff and the whole thereof is now due and owing from defendant to plaintiff.

Wherefore, plaintiff prays that it have and recover from defendant the sum of \$11,880.12 to-

gether with interest thereon from the date of payment thereof as provided by law, that it recover the costs of suit herein, and that the Court grant such other and further relief as may be proper in the premises.

/s/ GEORGE H. KOSTER,

/s/ BAYLEY KOHLMEIER,

/s/ ROBERT H. EVANS,

Attorneys for Plaintiff.

State of Washington,
County of Whatcom—ss.

L. Turcotte, being first duly sworn, deposes and says:

That he is an officer, to wit, Exec. Vice President of Puget Sound Pulp & Timber Co., plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ L. TURCOTTE.

Subscribed and sworn to before me this 16th day of October, 1946.

[Seal] /s/ J. C. MCGREGOR,
Notary Public.

EXHIBIT A

Puget Sound Pulp & Timber Co.
Bellingham, Washington U. S. A.

November 29, 1944.

Protest of Puget Sound Pulp & Timber Co. Against
Payment of Interest on Excess Profits Tax
Collector of Internal Revenue
District of Washington
Tacoma, Washington

Dear Sir:

Pursuant to your demand, Puget sound Pulp & Timber Co. hereby tenders its check dated November 29, 1944 drawn on Seattle-First National Bank, Bellingham, in the amount of \$11,880.12, in payment of additional interest demanded by you upon the additional excess profits taxes assessed against Puget Sound Pulp & Timber Co. for the year 1942. This payment is made under protest and duress and as the result of your demands and threats to enforce collection thereof against the property of this company. The protest is based upon the following grounds:

1. Said sum of \$11,880.12 represents interest at the rate of six percent per annum for the period March 15, 1943 to November 30, 1944 on \$135,203.36, the portion of this company's excess profits tax for the year 1942, payment of which was deferred in accordance with and pursuant to Section 710(a)(5) of the Internal Revenue Code.

2. Under the provision of Section 710(a)(5) of the Internal Revenue Code said \$135,203.36 did not become payable until demanded or until this company's claim for relief under Section 722 of the Internal Revenue Code was acted upon by the Commissioner of Internal Revenue. Said claim for relief was acted upon by the Commissioner on August 29, 1944.

3. Under the provisions of Section 292 of the Internal Revenue Code, interest is payable on said \$135,203.36 only from the date said tax was payable. Said \$135,203.36 was not payable prior to August 29, 1944.

4. The interest paid herewith in the amount of \$11,880.12 has been erroneously and illegally assessed and demanded and is not due or payable.

Respectfully submitted,

PUGET SOUND PULP &
TIMBER CO.

L. TURCOTTE,

Executive Vice President.

EXHIBIT B

Form 843 Treasury Department

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Washington,
County of Whatcom—ss:

Name of taxpayer or purchaser of stamps Puget
Sound Pulp & Timber Co.

Business address Bellingham, Washington.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington.

2. Period (if for income tax, make separate form for each taxable year) from, 19.., to, 19...

3. Character of assessment or tax Interest on excess profits tax for year 1942.

4. Amount of assessment, \$11,880.12; dates of payment

5. Date stamps were purchased from the Government

6. Amount to be refunded \$11,880.12.

7. Amount to be abated (not applicable to income, gift, or estate taxes) \$.

8. The time within which this claim may be legally filed expires, under section of (Revenue Act or Internal Revenue Code) on, 19 ...

The deponent verily believes that this claim should be allowed for the following reasons:

Puget Sound Pulp & Timber Co.

The interest in the amount of \$11,880.12, refund of which is hereby claimed, is interest at the rate of 6% per annum from the period from March 15, 1943 to November 30, 1944 on the sum of \$135,-203.36. Said \$135,203.36 is the portion of claimant's excess profits tax for the year 1942, the payment of which claimant elected to defer in accordance with and pursuant to the provision of Section 710(a) (5) of the Internal Revenue Code. The claim

for relief under section 722 of the Internal Revenue Code (Form 991) was attached to claimant's excess profits tax return for the year 1942 and was denied by the Commissioner on August 29, 1944.

Under the provisions of section 710(a)(5) of the Internal Revenue Code said \$135,203.36 was not payable until demanded or at least until the aforesaid claim for relief was acted upon by the Commissioner and under the provisions of Section 292 of the Internal Revenue Code interest on any portion thereof determined to be due was payable only from the date prescribed for the payment thereof; namely, the date payment was demanded or the date the claim for relief was acted upon.

On or about October 13, 1944 claimant paid the sum of \$194,596.26 as additional excess profits tax and interest thereon for the year 1942. \$135,609.16 of said sum represented the aforesaid \$135,203.36 with interest thereon from August 29, 1944 in the amount of \$405.80. Thereafter on November 29, 1944 claimant paid additional interest on said \$135,203.36 for the period from March 15, 1943 to November 30, 1944 in the amount of \$11,880.12. Said additional interest was paid pursuant to demand of the Collector of Internal Revenue and was paid under written protest. Said \$11,880.12 was not due or payable and was erroneously, illegally assessed and collected and should be refunded.

EXHIBIT C

Treasury Department
Washington

March 21, 1945.

Office of
Commissioner of
Internal Revenue

IT:C1:CC-6:CES

Puget Sound Pulp & Timber Company
Bellingham, Washington

Gentlemen:

Reference is made to your claim for refund of interest on Form 843 in the amount of \$11,880.12, filed November 30, 1944, for the taxable year ended December 31, 1942.

In your claim you state that this amount represents interest computed at 6% per annum from March 15, 1943 to November 30, 1944, on \$135,-203.36 additional excess profits tax resulting from the disallowance of a deferment under section 710(a)(5) of the Internal Revenue Code.

You claim that interest should have been computed from August 29, 1944, the date of disallowance of your application for relief under Section 722 of the Internal Revenue Code, rather than from the due date of the return, March 15, 1943.

Since that portion of the additional tax, \$135,-203.36, resulting from the disallowance of the relief requested under section 722 represented tax which was deferred under section 710(a)(5) on the re-

turn, such tax represents a deficiency as set forth in section 271 of the Internal Revenue Code and as a deficiency under such section of the Code is subject to the interest provisions of section 292(2) of the Code. There is no provision in the Internal Revenue Code which provides that interest shall be computed from the date of disallowance of the claim under section 722 where a deferment is involved under section 710(a)(5) of the Internal Revenue Code.

Therefore, it is held by this office that interest was correctly computed from the due date of the return and your claim for refund is not allowable. In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim is hereby given by registered mail.

By direction of the Commissioner:

Yours very truly,

NORMAN D. CANN,
Deputy Commissioner.

[Endorsed]: Filed Oct. 18, 1946.

District Court of the United States for the Western
District of Washington, Southern Division

Civil Action File No. 951

PUGET SOUND PULP & TIMBER CO.,
Plaintiff,

vs.

CLARK SQUIRE, United States Collector of In-
ternal Revenue for State of Washington,
Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon George E. Koster, Bayley Kohlmeier and Robert H. Evans, plaintiff's attorneys, whose address is 1111 Dexter Horton Building, Seattle, Washington an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 18, 1946.

MILLARD P. THOMAS,
Clerk of Court.

[Seal] By E. E. REDMAYNE,
Deputy Clerk.

Return on Service of Writ attached.

Return Receipt by Registered Mail attached.

[Endorsed]: Filed Oct. 25, 1946.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the plaintiff, by its attorneys, George H. Koster, Bayley Kohlmeier and Robert H. Evans, and defendant, by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, that subject to the discretion of the Court defendant may have to and including the 15th day of February, 1947, in which to answer or otherwise plead in the above-entitled cause.

Dated this 12th day of December, 1946.

/s/ GEO. H. KOSTER,

/s/ BAYLEY KOHLMEIER,

/s/ ROBERT H. EVANS,

Attorneys for Plaintiff.

J. CHARLES DENNIS,

United States Attorney.

HARRY SAGER,

Assistant United States
Attorney.

THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of
Internal Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Dec. 17, 1946.

[Title of District Court and Cause.]

ORDER

The parties having so stipulated, it is hereby Ordered that the defendant may have to and including the 15th day of February, 1947, in which to answer or otherwise plead in the above-entitled matter.

Done in open court this 17th day of Dec., 1946.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ HARRY SAGER,
Asst. U.S. Atty.

O.K.

/s/ ROBERT H. EVANS.

[Endorsed]: Filed Dec. 17, 1946.

[Title of District Court and Cause.]

ANSWER

Defendant answers as follows:

1.

Admits the allegations contained in paragraph I of the complaint except denies that the interest or any portion thereof was erroneously or illegally assessed or collected.

2.

Admits the allegations contained in paragraph II of the complaint.

3.

Admits the allegations contained in paragraph III of the complaint.

4.

Admits the allegations contained in paragraph IV of the complaint except denies that the adjusted excess profits net income was shown in the return in the amount alleged and avers that the adjusted excess profits net income disclosed by the return is in the amount of \$1,884,586.83, and that the figure alleged in paragraph IV of the complaint in the amount of \$2,584,101.85 was shown on the return as the excess profits net income prior to adjustment.

5.

Denies all the allegations contained in paragraph V of the complaint except admits that plaintiff's adjusted excess profits net income for the calendar year 1942, as disclosed by the return, computed without reference to Section 722 of the Internal Revenue Code, exceeded 50% of plaintiff's normal tax net income reported for said year, computed without the credit provided in Section 26(e) of the Internal Revenue Code; and further admits that plaintiff claimed the benefits of Section 722 of the Internal Revenue Code in its final excess profits tax return for the calendar year 1942, and that

plaintiff reduced the amount of the excess profits tax, computed without the benefit of Section 710(a)(5) of the Internal Revenue Code, by the amount of \$135,203.36.

6.

Admits the allegations contained in paragraph VI of the complaint.

7.

Admits the allegations contained in paragraph VII of the complaint.

8.

Admits the allegations contained in paragraph VIII of the complaint except defendant avers that the amount of excess profits tax liability reported in plaintiff's return, adjusted for renegotiation, in the amount of \$1,291,432.31, is exclusive of the additional assessment of \$135,203.36 representing the deferred payment under Section 710(a)(5) of the Internal Revenue Code.

9.

Admits the allegations contained in paragraph IX of the complaint except denies that the sum of \$135,203.36 represented a reduction in the tax.

10.

Denies all the allegations contained in paragraph X of the complaint except admits that pursuant to the alleged assessment plaintiff paid the alleged additional tax and interest thereon at the rate of

6% per annum from March 15, 1943, to the date of payment thereof; the alleged deficiency and interest was paid or satisfied by credit in the amounts and on the dates as follows: On October 14, 1944, there was paid or credited \$183,514.93; on November 30, 1944, there was paid \$11,762.50; and on December 7, 1944, there was paid \$117.62. Defendant admits that the sum of \$11,880.12 representing interest on \$135,203.36 from March 15, 1943, to November 30, 1944, was included in the payments above alleged.

11.

Denies all the allegations contained in paragraph XI of the complaint except defendant admits that interest of \$11,880.12 paid by plaintiff was assessed and collected for the period from March 15, 1943, to November 29, 1944, on the sum of \$135,203.36, which was, at the election of plaintiff, deferred under Section 710(a)(5) of the Internal Revenue Code, and that said sum of \$135,203.36 was not demanded of plaintiff until after August 29, 1944.

12.

Denies all the allegations contained in paragraph XII of the complaint.

13.

Denies all the allegations contained in paragraph XIII of the complaint except admits that on or about November 30, 1944, plaintiff filed with the Collector of Internal Revenue for the District of Washington an instrument purporting to be a claim

for refund in the amount of \$11,880.12 and that Exhibit B attached to the complaint is a copy of what it purports to be. Defendant further admits that on or about March 21, 1945, the Commissioner of Internal Revenue rejected the purported claim and that Exhibit C attached to the complaint is a true copy of what it purports to be.

14.

Denies all the allegations contained in paragraph XIV of the complaint except admits that no part of the amount sought to be recovered has been refunded or credited to plaintiff.

Wherefore, having fully answered defendant prays judgment and costs.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 14, 1947.

[Title of District Court and Cause.]

STIPULATION

It is stipulated between the plaintiff and the defendant, through their respective attorneys of record, that because of negotiations now pending which may lead to a settlement and dismissal of the above case, that the same may be stricken by the court from its setting November 5, 1947, and be continued upon the calendar of the court until called for setting by the attorneys of record.

Dated this 20th day of October, 1947.

/s/ GEO. H. KOSTER,

/s/ BAILEY KOHLMIER,

/s/ ROBERT H. EVANS,

Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of
Internal Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Oct. 22, 1947.

[Title of District Court and Cause.]

ORDER

In consideration of the stipulation signed and filed herein,

It Is Ordered that the above cause be stricken from the trial calendar of the court.

Done In Open Court this 22nd day of Oct., 1947.

/s/ CHARLES H. LEAVY,
U.S. Dist. Judge.

Okeh:

/s/ ROBERT H. EVANS,
Atty. Plaintiff.

/s/ THOMAS R. WINTER.

Presented by:

/s/ [Illegible]
Asst. U.S. Attorney.

[Endorsed]: Filed Oct. 22, 1947.

[Title of District Court and Cause.]

ORDER

The undersigned judge of the above entitled court having determined that he is disqualified to sit at the trial or other disposition of the above cause, hereby orders and directs that the above action be transferred to the Northern Division of the Western District of Washington at Seattle for trial or other disposition, counsel for the respective parties having approved of this order.

Done In Open Court this 13th day of Aug., 1948.

/s/ CHARLES H. LEAVY,
U.S. Dist. Judge.

We, the undersigned attorneys for the parties above named, hereby approve the foregoing Order.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

By /s/ ROBERT H. EVANS,
Attorneys for the Plaintiff.

/s/ J. CHARLES DENNIS,

/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 13, 1948.

[Title of District Court and Cause.]

MOTION TO PLACE ON THE TRIAL
CALENDAR

Comes now the Plaintiff, through its attorneys,
Messrs. Evans, McLaren, Lane, Powell & Beeks,
and moves the above entitled court to place the
above entitled cause upon the trial calendar of the
above entitled court.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ ROBERT H. EVANS.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1948.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: The clerk of the above entitled court and to
Messrs. J. Charles Dennis and Thomas R.
Winter, Attorneys for Defendant, Clark Squire,
United States Collector of Internal Revenue,
for the State of Washington:

You will please take notice that the undersigned
will bring on for hearing the motion to place on the
trial calendar heretofore filed by the Plaintiff be-
fore the above entitled court, in the United States
Court House, Seattle, Washington, on the 20th day

of September, 1948, at 10:00 o'clock A.M. on that day or as soon thereafter as the Attorneys can be heard.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ ROBERT H. EVANS,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1948.

In the District Court of the United States in and
for the Western District of Washington, North-
ern Division

No. 2077

PUGET SOUND PULP AND TIMBER CO.,
Plaintiff,

vs.

CLARK SQUIRE, United States Collector of In-
ternal Revenue for the State of Washington,
Defendant.

October 20, 1948.

Black, J.

HEARING FOR PERPETUATION OF
TESTIMONY

of Lawson P. Turcotte, a witness for Plaintiff.

Mr. Coster: This case is a suit for recovery of
some interest paid on certain additional excess

profits taxes that were assessed against the Puget Sound Pulp & Timber Company for the year 1942 and collected by the defendant, the Collector of Internal Revenue, from the plaintiff in October 1944. Included in this additional tax was a sum of approximately one hundred thirty-five thousand dollars which the plaintiff had a right under the law to defer until the Collector [1] made demand for the payment. When the Collector made the demand he charged interest on this \$135,000 from March 15, 1943, which was the due date of the 1942 tax rather than September 30, the date of his demand.

It is our position that no interest should have been charged on this particular sum of money until the date of the demand.

In order that the Court may understand the testimony we are about to take here, the reason that this taxpayer had a right to defer this amount of money was this. In 1942 there was in effect the excess profits tax law which imposed a tax of 90% on profits above a certain credit. Congress realized that some companies might be discriminated against in that they did not have adequate credit. So Congress provided a law which gave the right to apply for relief from that tax if they met certain conditions. At the same time Congress also gave to those companies who thought that they qualified for relief the right to defer the payment of a certain amount of the tax.

* Page numbering appearing at top of page of original Reporter's Transcript.

In this particular case the Puget Sound Pulp & Timber Company filed a claim for relief when it filed its tax return and deferred the payment of this \$135,000 tax which it had a right to defer under the law. [2]

Now, ordinarily, a tax is due for payment at the time the return is filed, but in this particular instance the law gave the taxpayer the right to defer.

Also, ordinarily, if there is an additional tax due there is interest to be charged on this additional tax from the date the return is due. The statute provides that the interest is to be charged from the date prescribed for payment of the tax.

Now, in the case of the deferred tax it was eliminated from the amount of the tax that was prescribed for payment on the due date of the return, and the law provided that if ultimately it shall become due, it shall be paid as a deficiency and the date prescribed for the payment of the deficiency is the date of the notice and demand from the Collector.

So we present this case on the point that inasmuch as the date prescribed for payment of this tax was not until demand for payment, the interest should not start until that date. And there are some eleven or twelve thousand dollars worth of interest involved in this case.

And I might say in that connection that there is some computation of this interest and other figures which is slightly technical, and counsel and I have agreed that if the Court should find that this tax-

payer [3] is entitled to refund, we can compute the amount of the judgment. The actual computations are not necessarily involved in the presentation of the case.

The Court: All right. Is there anything you wish to say, Mr. Winter?

Mr. Winter: No, I think counsel has advised the Court as to the issue. The sole issue is whether or not the plaintiff was required to pay interest on excess profits taxes which were deferred between the time of deferment and the time their claim under 722 was denied. Plaintiff apparently takes the position that inasmuch as it was not required to pay because of the deferment statute and no demand was made upon the plaintiff for the payment because it was entitled to defer it until the Commissioner decided the issue as to whether or not they were entitled to relief under 722, that it relieved it of the payment of that interest.

It is the government's position that that is a deficiency and when a deficiency is finally denied there is due interest on the deficiency which has not been paid, and to grant relief to a taxpayer similarly situated would be giving relief to such a taxpayer and denying relief to other taxpayers who did make any claim under the statute. In other words, the taxpayer did not pay the money; it had a deficiency; it was finally determined [4] it had a deficiency as of March 15, 1943 of this \$135,000; it was not paid until November, 1944. At that time interest, of course, was collected. The tax was

assessed as a deficiency as of March 15, 1943, when it was due. And it is our position there is nothing in the statute or regulations which grants plaintiff relief in this action.

It is primarily and purely a question of law and interpretation of the tax statute.

The Court: How much time do you think the presentation of the evidence will take after this witness?

Mr. Coster: In regard to this one witness, we are willing to submit it this afternoon and leave your Honor freed of tomorrow's calendar. We just have some exhibits.

The Court: How long do you think examination of this witness will take today?

Mr. Coster: Five minutes.

The Court: Let me read the pleadings again to refresh my recollection.

(Court does so.)

Mr. Coster: I might add one thing. The pleadings establish the filing of the return, the filing of the claim for relief with the return, the assessment of additional tax and demand for additional tax and interest. The only reason we have the witness here to testify is that [5] I felt it important inasmuch as the filing of claim was a reason for the deferment. That would show it was a bona fide claim and not merely for the purpose of deferring the tax. The only other testimony is the exhibits showing notice and demand.

Mr. Winter: Before your Honor starts reading the pleadings there is one further matter I want to call to the attention of the Court. Since the commencement of this action a deficiency of \$194.58 income tax and an over assessment of \$14,674.63 in excess profits tax has been allowed and the deficiency paid. The deficiency—that is with respect to this taxable year—the over assessment was caused by allowance of additional timber depletion, which is not in issue in this case, and is covered by refund claim, which refund claim was allowed and paid. I am not certain as to whether or not part of the interest which is sought to be recovered here has not been recovered and paid under that refund claim.

Counsel has agreed with me that we will submit to your Honor for decision in this case whether or not—the sole legal question as to whether or not interest is collectable or is not collectable. Your Honor is to answer either affirmatively or negatively whether it is or is not collectable. And based upon your Honor's decision in that matter we will then submit a form of judgment. If your [6] Honor finds it is not collectable, then we will have to compute the amount. But there is no quarrel. In other words, we will submit it under Rule—similar to Rule 50 in the Tax Court. We can work the computation out amongst ourselves. So that your Honor will only be concerned with the question of law, and that is whether the interest is or is not collectable.

The Court: I so understood from the opening statement by counsel for plaintiff.

Mr. Coster: I would like to call Mr. Turcotte.

LAWSON P. TURCOTTE

was called as a witness for plaintiff, and after being first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Coster:

Q. Will you state your full name, please?

A. Lawson P. Turcotte.

Q. Where do you live?

A. Bellingham, Washington.

Q. Are you associated with the Puget Sound Pulp & Timber Company, the plaintiff in this case?

A. I am. I am executive vice-president of the company.

Q. How long have you been executive vice-president of the company? [7]

A. Since 1942.

Q. The pleadings in this case, Mr. Turcotte, show that the Puget Sound Pulp & Timber Company filed an excess profits return for the year 1942 and also a claim for relief from excess profits tax under Section 722 of the Internal Revenue Code. Did you have anything to do with the filing of that claim?

A. I supervised the preparation of the claim together with our tax counsel and executed the claim for filing with our 1942 income tax return.

(Testimony of Lawson P. Turcotte.)

Q. What was the reason for the filing of the claim?

Mr. Winter: I object to that question as irrelevant and immaterial. The claim speaks for itself. It calls for a conclusion of the witness. I have a verified copy of the claim that was filed at that time.

Mr. Coster: The only purpose of the testimony is to avoid any possible inference that the claim might have been filed solely for the purpose of deferring payment of the tax. I want to show the reason for the filing of the claim. The claim shows what it is, but it does not show the reason.

Mr. Winter: It also shows upon what basis and what contentions were made therein, and I submit the claim is the best evidence of what it contains.

The Court: Will you read the question, Mr. Reporter? [8]

(Reporter reads question objected to.)

The Court: Objection has been made. Ruling will be reserved on the objection, and it will be understood that the witness may now be examined so as to make an offer of proof under oath. You may examine the witness, and it will be an offer of proof, and if I later determine that the testimony should be admitted, that will suffice. Otherwise your record will be clear as to what you wish to prove.

A. In answer to that question, we felt—the offi-

(Testimony of Lawson P. Turcotte.)

cers of the company felt that the tax was discriminatory to the company, and we felt that we were entitled to relief under Section 22 as provided by the law.

Q. Section 722?

A. I beg your pardon; 722 of the law.

Q. Now, Mr. Turcotte, the pleadings show that on August 29, 1944 the Commissioner of Internal Revenue rejected the claim for relief——

The Court: This question, I take it, is outside the offer of proof, Mr. Winter?

Mr. Winter: Yes, your Honor; I think we admitted that the Commissioner rejected the claim.

Mr. Coster: It is admitted in the pleadings.

Mr. Winter: We admit the Commissioner denied relief.

Q. Did you have any negotiations with any officers of the [9] Commissioner of Internal Revenue about this claim? That is, after August 29, 1944?

A. Yes, in 1947 the case was reopened and reviewed with the local Internal Revenue Department, who granted the company a certain portion of relief under our application for relief and recommended this relief to Washington.

Q. Did you then have any further negotiations with any other offices of the Commissioner of Internal Revenue?

A. Well, in 1948 the newly appointed counsel for the Internal Revenue Department gave our

(Testimony of Lawson P. Turcotte.)

company a hearing which I attended. That was in 1948. And they rejected the recommendation of the local Internal Revenue Department.

Q. Now, has the company filed a petition with the Tax Court appealing the rejection of the claim for relief?

A. The company has since rejection filed an appeal to the Tax Court.

Mr. Coster: No further examination, your Honor.

Cross-Examination

Q. (By Mr. Winter): As I understand your testimony then, Mr. Turcotte, you filed your claim for relief under 722, and you executed it?

A. Yes.

(Document marked Defendant's Exhibit "A" for identification.)

Q. I will show you what purports to be a photostatic [10] copy—a certified copy of the claim. Is that the claim which you filed or copy of the original of that claim?

A. Yes, it is.

Q. Now, as I understand it, you had a hearing—did you have a hearing before the Commissioner on the claim or before a representative of the Commissioner in the revenue agent's office? Before it was rejected, I mean.

The Court: There are too many questions in that.

Mr. Winter: I will withdraw it.

(Testimony of Lawson P. Turcotte.)

The Court: All the questions are withdrawn.

Q. After you filed your claim Exhibit A, then that was denied, is that right?

A. That is right.

Q. By the Commission. And that was in 1944, August 1944? A. Yes.

Q. On August 30, to be exact.

Mr. Coster: August 29.

A. I don't have the exact date.

Q. And I think you said that the claim was reopened after the appointment of tax counsel?

A. That is my understanding.

Q. And then you had conferences with the revenue agents? A. That is right.

Q. And it is your understanding they recommended some relief? [11]

A. They recommended some relief.

Q. But the Commissioner never granted that relief, and no relief has ever been granted up to the present time?

A. No relief has been granted.

Q. Relief was considered on the rehearing or upon the re-examination, and it was denied?

A. That is right.

Q. And you have now filed a petition with the Tax Court?

A. That is correct.

Q. For relief under 722?

A. That is correct.

Q. And that petition is still pending?

(Testimony of Lawson P. Turcotte.)

A. That is right.

Q. And no hearing has been held?

A. Not that I know of. We have had no notice of it.

Mr. Winter: That is all.

(Witness excused.)

Mr. Coster: At this time I wish to introduce as plaintiff's exhibit 1 a copy of the Collector's notice and demand for the payment of the additional tax for 1942, referred to in the pleadings.

Mr. Winter: We have no objection.

The Court: What is that?

Mr. Coster: The Collector's notice and demand for payment of additional tax for 1942, dated September 30, [12] 1944.

The Court: Exhibit 1 is offered. (Pause) There is no objection.

Mr. Winter: No objection.

The Court: And it is admitted.

(Plaintiff's Exhibit 1 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Copy

Statement of Income Tax Due

Form 17A—Rev. Feb. 1947, Treasury Department
Internal Revenue Service.

Date: EP Int.

Assessment: \$179,199.48, \$16,127.95.

Amount Paid:

Balance Due: \$195,327.43.

Account Number and Remarks: Sept. 22—529-
007-44; Rar Adt'l 1942 IT.

Notice is hereby given that the amount of tax, penalty, and interest stated above has been assessed against you. Demand is hereby made for immediate payment thereof. The law provides that if payment is not made within 10 days after date of this notice, interest will accrue at the rate of 6 per cent per annum from the date shown to the right until paid.

Puget Sound Pulp & Timber Co.

Laurel & Bay St.

Bellingham, Wash.

Date: Sept. 30, 1944.

To avoid further interest, the amount stated above
must be paid to the

Collector of Internal Revenue
at Tacoma, Washington within 10 days of the date
of this notice.

Admitted 10/20/48.

[Endorsed]: Filed Sept. 27, 1949.

Mr. Coster: I wish to introduce as Plaintiff's
Exhibit 2 a second notice and demand from the Col-
lector relating to the same tax. It is dated October
30, 1944.

Mr. Winter: No objection.

Mr. Coster: Plaintiff rests.

The Court: Exhibit 2 admitted.

(Plaintiff's Exhibit 2 for identification re-
ceived in evidence.)

PLAINTIFF'S EXHIBIT No. 2

Copy

Statement of Income Tax Due—Second Notice

Date: EP Int. 10/14/44, 10/14/44.

Charge: \$179,199.48, \$16,127.95.

Last Credit: \$13,508.30, \$170,056.63.

Unpaid Balance: \$11,762.50.

Account Number and Remarks: Adt'l 1942 IT
RAR, Sept. 22-529007-44.

Puget Sound Pulp & Timber Co.

Laurel & Bay St.

Bellingham, Wash.

Date of First Notice: Sept. 30, 1944.

Date of This Notice: Oct. 30, 1944.

The records of this office indicate that you are delinquent in making payment of the unpaid balance of tax and/or interest shown above.

It therefore becomes my duty to demand that this unpaid balance be paid, together with interest computed at the rate of 6 per cent per annum from the date prescribed for its payment to the date of payment, which interest has been incurred by failure to pay the unpaid balance within the prescribed time. If payment of the amount due the Government is not received within ten days from the date of this notice and demand, the Law provides that collection with costs may be made, if necessary, by seizure and sale of property.

To Insure Proper Credit, Return This Form with Remittance to the Collector of Internal Revenue at

Unpaid balance: \$11,762.50.

Delinquency interest computed from 9-30-44 to 11-9-44, \$117.62.

Total unpaid balance and interest thereon due as of the date indicated above, \$11,880.12.

/s/ CLARK SQUIRE,

Collector of Internal Revenue.

[Endorsed]: Filed Sept. 27, 1949.

Admitted 10/20/48.

The Court: All right, Mr. Winter.

Mr. Winter: Defendant rests.

The Court: Defendant rests.

Mr. Coster: Your Honor, I would like to ask leave to file a brief for plaintiff at this time in lieu of oral argument. The reason, I might say, is that this particular point,—it is the first time as far as I know that it has come before the court for adjudication, and it involves several very technical sections of the Internal Revenue Code. And I feel it [13] would be much better to present it by brief than argue it orally. For that reason I have already prepared a brief for plaintiff and am ready to file it.

The Court: You may file the brief.

(Mr. Coster does so.)

Mr. Winter: I would like to have some time, your Honor. I would like to submit this to the Attorney General to see whether or not that office desires to file a brief. They said they did previously.

The Court: How much time would you like?

Mr. Winter: I would like to have thirty days.

The Court: The defendant may have until and including Friday the 19th day of November, 1948 in which to serve and file an answering brief. That is Friday, November 19. That is thirty days from today.

Mr. Winter: Mr. Coster, with your permission—I don't know whether the Court would be interested

in this—I was going to suggest that I have a copy of Section 722 of the Code, but your Honor probably will not want to consider it until both briefs are filed. So therefore I will wait and file it with our brief. I also have a photostatic copy of the legislative history.

The Court: If you have it, why don't you file it [14] now? Then you will not forget.

Mr. Winter: I think I will file both of them now. (Mr. Winter does so.)

Mr. Winter: I have a copy of the Finance Committee's report accompanying House Resolution 3363 and both Section 722,—I just want to file them as part of the argument for the information of the Court, and they will be referred to in the brief.

The Court: The time I have allowed you is sufficient, is it?

Mr. Winter: I hope so, your Honor. I made it as reasonably short as I could——

The Court: I am willing to give you a little more time if you think you ought to have it.

Mr. Winter: I would prefer to have it just thirty days now, with leave of Court and counsel to ask, if necessary, for additional time as may be necessary.

The Court: How much time would you like for reply brief?

Mr. Coster: Oh, I think probably ten days from the time of service of defendant's brief. I don't

know what else I can say more than I have already said.

The Court: Where is service to be made?

Mr. Coster: Here, at the office of Mr. Evans.

Mr. Winter: Mr. Evans is co-counsel. [15]

The Court: All right. The plaintiff may have fourteen days from service of the defendant's answering brief in which to file and serve a reply brief. I may say to counsel for defendant the Court may be somewhat embarrassed in this case with respect to Defendant's Exhibit A for identification. What I have said as to Exhibit A for identification ought to remind defendant as to the state of the record.

Mr. Winter: I am satisfied.

The Court: You are satisfied. In other words, Exhibit A is not in evidence?

Mr. Winter: That is right. I don't think it is material because we admit that a claim was filed and it was denied. I may say to the Court we are not going to argue to the Court that the plaintiff did not believe it had a meritorious claim under 722.

The Court: Why shouldn't Exhibit A be admitted if it is referred to?

Mr. Winter: I would just as soon have it considered part of the record.

Mr. Coster: I would introduce it.

Mr. Winter: We will both jointly introduce it.

The Court: All right. Plaintiff and defendant jointly offer Exhibit A for identification. Is that right? [16]

Mr. Winter: Yes, I think what counsel had in mind——

The Court: Then Exhibit A is admitted.

(Defendant's Exhibit A for identification received in evidence.)

Exhibit A—(Continued)

**History of Puget Sound Pulp and Timber Co. and
Detailed Description of the Character of the
Business Carried On.**

The Puget Sound Pulp and Timber Co. was incorporated March 11, 1929, under the laws of the state of Delaware. Upon its organization in 1929 it acquired in exchange for its capital stock certain properties then owned by various corporations and individuals, consisting of an unbleached sulphite mill (40 tons daily capacity) at Anacortes, Washington, a similar mill with larger capacity (60 tons) at Bellingham, Washington; properties located at or near Clear Lake, Skagit County, Washington, consisting generally of a sawmill, shingle mill, capital stock in Puget Sound & Cascade Railway Company, certain timber lands, logging equipment, shops and miscellaneous properties; also certain property at Lake Stevens, capital stock of Hartford Eastern Railway Company, certain timber lands and miscellaneous properties. Shortly after its organization the Company purchased a site for a pulp mill at Everett, Washington, and constructed thereon a 200-ton daily capacity bleached sulphite pulp mill which was completed in 1930 at a cost of approximately \$4,250,000. The money required for this purpose was obtained through a loan secured by a mortgage on all of the property and assets of the Company in the amount of four and a half million dollars.

The mill property at Clear Lake and the two railroads required a considerable expenditure of addi-

Exhibit A—(Continued)

tional capital for the purpose of placing them in an operating condition. Due to these expenditures and to conditions beyond the control of the Company the Company defaulted in the payment of the mortgage interest due February 15, 1932, and foreclosure was threatened. The issue was settled by a division of the property, the mortgagee taking the new mill at Everett and the stock of the Hartford Eastern Railway Company and the miscellaneous properties in Snohomish County in full satisfaction of its mortgage, the Company retaining the mill at Anacortes, the mill at Bellingham, the lumber and shingle mill and logging equipment in Skagit County and the capital stock of the Puget Sound & Cascade Railway Company. It may be said that the principal reason for the default on the mortgage was the depression which occurred in the United States in 1932 together with the fact that the pulp the Company was producing was sold in competition with pulp from the Scandinavian countries who by that time had depreciated their currencies. This enabled the Scandinavian dealers to sell at an advantage over domestic manufacturers. This competition wrecked the pulp market in the United States.

It may be said that the properties which the Company salvaged from its division of the mortgage consisted of two initially built plants in the state of Washington for the production of unbleached shredded pulp. These plants were more or less pilot plants as they were the first built in the Northwest.

Exhibit A—(Continued)

Due to many improvements which occurred later the Company found it impossible to compete on the domestic market and decided to modernize its plant at Bellingham. This was done in 1937 through the sale of a preferred stock issue in the amount of two and a half million dollars, the proceeds of which with other capital were used to build an up-to-date plant as an extension to the Bellingham plant. The Company continued to operate the mill at Anacortes until it sold this plant to the Scott Paper Company in 1940.

In 1936 the Company disposed of the sawmill and shingle mill at Clear Lake by dismantling and sale of same. The proceeds of this sale were used to retire obligations payable upon a loan secured by the Company from the Reconstruction Finance in 1932. The Company continued to operate the old and the new plant at Bellingham at full capacity until its operations in that regard were restricted by orders of the War Production Board in October, 1942. It should be added that in 1937 the Company further extended its Bellingham plant by the addition of certain new machinery and certain digesters, so that by the end of that year the plant was capable of producing approximately 170 thousand tons annually.

In the years 1940 and 1941 the Company realized that its timber holdings were insufficient to supply the Company with a source of raw material and in order to help out this situation it purchased certain

Exhibit A—(Continued)

timber holdings in British Columbia, Canada, at an outlay of approximately two million dollars. The money for this purchase was financed by extended bank loans of one million six hundred fifty thousand dollars, the remaining cost of the properties being paid for by the Company out of current working capital. It is estimated that the properties so acquired contain some four billion feet of virgin timber consisting of fir, cedar and pulp specie timber, together with a certain logging railroad and other logging equipment, etc.

The principal character of the Company's business as carried on through the years is in the manufacture and producing of unbleached sulphite pulp, the Bellingham mill now having a capacity, as stated above, of 170,000 tons per annum. The logs produced from the logging operations of the Company in the United States, other than pulp species, have been sold on the open market, the pulp species having been used in the Company's manufacturing processes. It was hoped that at the time the properties in Canada were acquired the Company could secure a source of raw material from its logging operations carried on there. This, however, it has been unable to do except in a limited way, owing to Canadian restrictions since imposed on the export of logs.

It is quite difficult for this Company to submit financial data prior to the years 1936 and 1939 which would prove a guide to the possible earnings of the

Exhibit A—(Continued)

Company, principally for the reason that in the years 1929 and 1930 it was carrying on a building and rehabilitation program and in 1932 the nationwide depression occurred, which was further aggravated by the unfair competition from the dumping of pulp by foreign countries on the markets of the United States. These circumstances, as we have said above, forced the Company to default on its mortgage and in order to avoid foreclosure it had to give up its new and up-to-date mill in Everett. The years 1934 and 1935 were spent largely in an effort to rehabilitate the Company's position so as to place it where it could obtain sufficient finances to operate successfully. During these years, however, pulp prices on the domestic market were unreasonably low as shown by the fact that in the ten years from 1922 to 1932 the normal prices of pulp ranged from \$55 to \$60 per ton Atlantic seaboard. In 1932 these prices dropped to as low as \$34 per ton Atlantic seaboard. Accurate statistics supporting these statements are available in government reports.

Statement Establishing Normal Earnings

The taxpayer believes that its normal earnings can best be established by elimination of the abnormal conditions which prevailed during the latter part of 1937, and during the years 1938 and 1939.

First, the taxpayer believes that the price for its product was abnormally low in 1939 due to the

Exhibit A—(Continued)

dumping of foreign pulp which commenced in the latter part of 1937. Therefore, it is necessary to determine what is the normal price of pulp for that year. Taxpayer believes the normal price of pulp should be the average adjusted price from January 1, 1935 to December 31, 1938 as used in the computation shown in the accompanying Schedule. This price should be applied to all of the taxpayer's domestic sales of pulp for the year 1939 to determine the normal returns from sales of domestic pulp during that year.

Secondly, an adjustment should be made by reason of the increased capacity of taxpayer's mill. This adjustment would be applied to the earnings of the Company from January 1, 1936, to December 31, 1939. Therefore, there should be added to the profits for this period the additional amount of profits which would have been realized had the amount of increased capacity been available by January 1, 1936.

Third, the earnings for the years 1937, 1938 and 1939 should be adjusted to reflect the loss of the Japanese markets. There should be included in the earnings for those years the amount of profit which the Company would have realized had the contracts with the Japanese customers been completed according to their terms. When proper adjustment is made for each of the base period years by the application of the foregoing factors the taxpayer be-

Exhibit A—(Continued)

believes that those years will then reflect its normal earnings.

General

In the data submitted herewith, we have attempted to point out that the Company's income in the base period years is abnormal and not a fair basis for tax purposes in view of conditions which prevailed prior to the base period years and during such years. We have attempted to suggest a basic formula which we believe is fair and should be applied to our particular situation. However, we should be pleased to submit such additional information as may be required in connection with your consideration of this application. A complete record of the Company is on file with Mr. W. P. Ullman in the Treasury Department, together with audit statements, etc., previously prepared.

Schedule B.

1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events. (Section 722 (b)(1).

(a) Describe the events and time of occurrence.

Normal production and operation of the Company's plants were interrupted during the years of 1938 and 1939 because of the following unusual and peculiar events. In 1937 the Company contracted at the then prevailing market prices for the sale of 65,000 tons of pulp, representing approximately

Exhibit A—(Continued)

60% of the Company's entire output, to responsible paper mills in Japan. These paper mills had been customers of the Company since 1929 and the tonnage sold was comparable in the percentage of total production, and in actual tonnage to the pulp sold to these firms in prior years. In fact, the tonnage sold represented old as well as new business, but at higher prices. These orders were firm commitments and the Company would have realized a substantial profit therefrom in 1937 and a somewhat larger profit in 1938, as the major portion of the tonnage sold was for shipment in the last mentioned year. A list of the Company's Japanese customers, date of each contract, tonnage and sale price is listed in Exhibit "A" hereto attached. In the fall of 1937 the Company was advised by its customers in Japan that because of the Japanese-China war they were unable to secure permits from the Japanese government for the necessary foreign exchange to complete their contracts of purchase. Consequently all of this business was lost to the company. In the meantime domestic prices had dropped sharply due to the dumping of foreign pulps in the United States. The loss of the Japanese customers not only forced the Company to sell where it could on the domestic market at the lower prices, but to find new customers for approximately 60% of its entire output and some of its pulp it did not succeed in selling at all during the period.

(b) State taxable years in the base period dur-

Exhibit A—(Continued)

ing which production, output, or operations were affected.

Due to conditions stated above the Company was forced to shut down one of its plants for the entire year of 1938 and for 10 months in 1939, and another of its plants for 2 months in 1938. Following is shown the capacity of the Company's plants for the two years mentioned, as well as the actual production.

	Capacity Tons of 2000#	Production Tons of 2000#	Rate of Production to Capacity
1938	84,000	47,682	56.76%
1939	115,000	94,416	82.10%

2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events. (Sections 722 (b) (2).

(a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member.

The temporary economic events unusual in the case of this Company are stated under two headings.

(1) Loss of business in 1937 and 1938 unusual and beyond the control of the Company.

Under this heading reference is made to statement under 1(a) describing the loss of 65,000 tons of pulp orders with Japanese customers which caused an economic dislocation of the Company's business in the base years of 1937 and 1938 as

Exhibit A—(Continued)

well as having a direct bearing on the Company's business in 1939.

(2) Foreign competition and dumping of pulp into the United States markets.

Continued dumping of foreign pulps into the United States markets was prevalent in the years 1938-1939 and this Company appealed to the United States Treasury Department for relief from this dumping in a formal application under date of May 16, 1939, in which hearings were held in the Treasury Department under Mr. W. P. Uhlmann, and in connection with that application the Company made full disclosure of the effect of this dumping on the Company's business and its inability to continue operations if this dumping was not stopped. The Company's application did not result in any relief from the Government under the Anti-Dumping Law. The application was supported by fully audited statements of the history of the Company and the effect of this unfair foreign competition which came about through the "freezing" of foreign wood-pulp to the "free" list for entry into the United States.

As an illustration of comparison of imports during the base years of 1936-1939 with those of prior years, following are the import figures for the 4 year periods cited:

Years 1928-1931 7,062,329 tons

Years 1932-1935 7,163,555 tons

Years 1936-1939 8,408,939 tons

Exhibit A—(Continued)

Details of such dumping of pulps into the United States markets are more fully stated as follows:

During this period and up to the present time there has been no duty imposed on the importation of pulp into the United States, but there has been continuously in effect the Anti-Dumping Act of 1921 prohibiting the importation or the sale by foreign interests of competitive products at less than their foreign market value or cost of their production, marketing and sales expense, as defined in Sections 205-206 of said Act. During the base years 1936-1939 the productive capacity of domestic plants manufacturing sulphite pulp in the United States did not exceed the domestic demand for their product and had it not been for foreign competition and imports at prices below foreign market and cost, the taxpayer would have been able to market advantageously all of its productive capacity. However, during 1938 and up until the outbreak of war large quantities of foreign sulphite pulp were imported into the United States, principally from Canada and Baltic countries, and sold at prices substantially below the cost of production or foreign market and in violation of the Federal Anti-Dumping Act, upon which the taxpayer had naturally relied.

The effect of such importation and contracts made in connection therewith as more fully explained hereafter was to restrict sales of taxpayer's product to a figure substantially below its capacity.

Exhibit A—(Continued)

These conditions also necessitated taxpayer selling its product at a very much reduced margin of profit, and oftentimes at a loss, determined by the prices at which imported pulp was offered. This situation prevailed up to the outbreak of the present world war at the end of August 1939, at which time restriction on shipping and cargo space, increases in freight rates, insurance, etc., completely changed the situation and while imports continued to arrive for a number of months, there was a restoration of normal prices and domestic demand. Taxpayer's business immediately revived and was operated at normal capacity for the last quarter of that year. This immediate effect upon taxpayer's business very strikingly illustrates the result of foreign dumping in the preceding period.

The situation presented in the foregoing paragraph not only involved a violation of positive provisions of law harmful to the taxpayer's business, but also involved, both as cause and effect, events of an extraordinary and unusual character arising out of the chaotic world conditions preceding the outbreak of the war which adversely affected the normal output of production and business both of the taxpayer and of the pulp industry. The picture is so complex that it is impossible to present the significant causes and effects in any great detail but the following will give a general idea of the broad outlines affecting the pulp industry and this taxpayer:

Exhibit A—(Continued)

Producers of paper grade chemical pulp are in two classes: One comprises self-contained paper mills which make their own pulp for the most part, but may buy some when prices are low or sell surplus when prices are high. The other comprises producers of pulp for market which sell to the converting paper mills in competition with foreign pulp. Converting paper mills depend upon these two sources for their pulp supply. The natural tendency has been for the paper mills or pulp users to contract ahead for large commitments of foreign pulp when prices are low and these purchases of foreign pulp do not show up in the records of imports until one or two years after the purchase.

The method of selling and form of contract covering sales of sulphite pulp to domestic consumers is very greatly different as between the domestic and foreign (particularly European) producers. Contracts made by European exporters are on the basis of firm commitment covering a definite amount to be delivered over a future period, often as long as two years at specified prices. These contracts were written so as to be binding upon both buyer and seller. In reality they are one sided, putting the domestic buyer at a disadvantage, for while he is legally bound to comply with his contract and accept delivery, and the foreign exporter insisted on such obligation, he had no practical remedy against the seller, and under actual

Exhibit A—(Continued)

conditions as they existed and developed during this period, the situation resulting from these contracts reacted increasingly to the advantage of the seller and to the disadvantage of the buyer.

On the other hand, contracts for the sale of domestic pulp are generally made subject to quantity and price adjustments and upon conditions which bind the seller to deliver a specified amount monthly over the year, but impose on the purchaser nothing more than an option to buy under such contracts. The seller names the price for each quarter about a month in advance and the buyer is then at liberty to take any or all or none of the amount called for in the contract. In a time of declining prices, such as existed in 1938 and the forepart of 1939, consumers were placed at the disadvantage of having to comply with foreign contracts, but at the same time were free to avoid any commitments to domestic producers.

The domestic market only includes the pulp moved on sales made to the paper mills by domestic and foreign pulp producers. European producers sold large quantities for delivery on long term contracts during 1936 and 1937 in U.S. markets, which buyers were ready to contract for owing to favorable market conditions. All markets were relatively low but stable during 1935 and 1936, with an increased demand. During 1937 European producers advanced prices in the spot market sensationally and by fostering a fear of scarcity were

Exhibit A—(Continued)

able to contract with domestic buyers for delivery during 1938 and 1939 at materially advanced prices. This resulted in a wide spread, during the year, between spot prices and on pulp being currently delivered on both foreign and domestic contracts.

Late in 1937 and increasingly into 1938 as the war clouds gathered in Europe, German owners of pulp mills, including some in the Baltic states and Finland, dumped pulp in the U.S. markets in order to get the dollar exchange and took other steps having similar effects in their effort to obtain U.S. dollars. Sales of pulp were subsidized by foreign governments. During 1938 and 1939 many thousands of cords of Canadian pulpwood were purchased by Germany in Canada, shipped from Montreal, Halifax and other ports to Germany to be made into pulp which was sold in the U.S. at prices hardly sufficient to pay for the price of the wood alone, to say nothing of conversion costs and freight. The freight rates on pulp carried from the Baltic and Scandinavian countries to the Atlantic Seaboard or to the Pacific coast via the Panama Canal were reduced to approximately 60% of the rates on like shipments in the reverse direction, and for delivery to the Atlantic Seaboard to about 50% of the cost of such delivery from the Pacific Coast. For example, the rate for shipment from the Pacific to the Atlantic Coast points was \$7.00 per short ton, against which delivery could be made from Norway, Sweden and Germany at a

Exhibit A—(Continued)

cost of \$3.57 per short ton. Subsidies in one form or another were granted by the foreign governments to pulp producers and transportation companies covering the export of foreign pulp to this country. Currency depreciation in the countries of the "Sterling Bloc" amounted to about 9% from December 1937 (and in the case of Finland to about 121½%) to September 1939 and gave European producers an advantage over domestic producers of \$3 to \$4 per ton in the U.S. market. Lower labor costs and insurance rates further benefited the foreign producers and depressed the local market. As an example, during 1938 labor costs per ton of pulp amounted to \$6.64 while comparable cost for production in Sweden, Norway and Germany amounted to \$2.24, and in Finland to only \$1.20.

In the early part of 1937 and through the summer of that year foreign producers, including the Canadians, realized the trend of exchange and subsidy advantages and proceeded to contract for sales in the domestic market for delivery not only during 1937 but into and in some cases through 1938, to the limit of their supply. These contracts were not made directly with foreign shippers, but rather with agents or companies or corporations in the U.S., principally in New York and Massachusetts acting on their behalf. Such contracts were firm as to both delivery and price. Having made these contracts and with their potential position in mind

Exhibit A—(Continued)

the foreign producers proceeded to ship tremendous quantities of pulp to themselves ex-docks and lake ports in the U.S. This foreign pulp flooded the country to such an extent that an embargo was placed upon intercoastal shipments affecting delivers and warehousing in nearly every port from Albany, New York, to Portland, Maine, and down to Norfolk, Virginia. By January 1, 1938, all grades of wood pulp on docks at Gulf and Atlantic Ports reached the unprecedented total of 345,000 tons.

In the latter part of 1937, as a result of these highly artificial conditions, prices reacted violently and such decline continued through 1937 and during the first half of 1938. In anticipating the coming war, foreign sales were made without consideration of cost with the object of getting all possible U.S. exchange. There was a substantial flight of capital particularly from Czecho-Slovakia, Rumania, and Jugo Slavakia where owners of capital were foreseeing the coming war and were endeavoring to get their wealth out of the country and particularly into the United States. Because of restrictions on exchange or security transactions, those interests sought exportable commodities. Wood pulp was one of the few such commodities readily exportable and marketable in the U.S., and such exporters turned to this outlet for transfer of their wealth to the U.S., at any price obtainable. All of this accelerated the decline of the domestic market and caused domestic buyers to

Exhibit A—(Continued)

cancel or avoid their committments under domestic contracts, thereby resulting in the interruption of the business of the domestic producers including the taxpayer, which conditions obtained particularly during the latter part of 1938 and the forepart of 1939 and up to the outbreak of the war.

When prices had declined to exceedingly low levels in late 1937 and 1938, European producers resorted to the expedient of "marrying" new contracts at a very low price, to their old, higher prices contracts in order to satisfy customers who were required to accept delivery of the European pulp under their firm commitments. In other words, instead of the seller agreeing to the cancellation of an existing contract either in whole or in part, a further contract would be imposed upon the domestic purchaser for additional tonnage at a substantial reduction in price. For example, if a customer had an old contract for 2000 tons at \$65 per ton, for future delivery, an additional 2000 tons would be contracted for at \$45 per ton, making an average price of \$55 per ton for the entire 4000 tons. This action resulted in interruption of taxpayer's business in two ways: Production was interrupted by these extended sales in the domestic market and abnormally low prices were set thereby since domestic producers, including the taxpayer, had to adjust current quarterly prices to meet the low prices in the new European contracts "married" to old contracts in an effort to avoid further

Exhibit A—(Continued)

cancellation and hold their customers. In 1939 foreign unbleached sulphite pulp was sold as low as \$33 per ton in the domestic market and domestic pulp as low as \$36 per ton.

Following a meeting in January of 1939, held in Washington with members of the President's cabinet, request was made for enforcement of the Federal Anti-Dumping Act of 1921, and various bills, resolutions and petitions were presented in Congress to the same effect. A showing was made by the U.S. Pulp Producer's Ass'n., that the Anti-Dumping Law was being violated by the importation of foreign pulp to the injury of domestic producers. Investigations were ordered under the Anti-Dumping Act and were under way when the outbreak of the world war so changed conditions that the Government saw fit to discontinue them. Previously, however, action had been taken by this country against Germany and certain Canadian producers in the form of an embargo and otherwise. The outbreak of the world war in September 1939 brought these abnormal conditions to a sudden end. European producers resorted to the war clause of their contracts for protection against increased freight rates, marine insurance, etc., thereby materially increasing the prices in their contracts and the shortage of cargo space soon resulted in practically a complete stoppage of European imports. Production in the plant of the taxpayer, which immediately prior thereto had been running at only

Exhibit A—(Continued)

about 55% of capacity, was fully resumed in September of 1939 and has continued at capacity since that time. The effect of the foregoing conditions upon the quantity of production and amount realized from sale of the company's product, and specific and detailed information of the extent and effect of foreign imports may be found in various statistical reports and will be supplied by the taxpayer upon request.

(b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.

Industry of which this Company is a part consists of manufacturers of bleached and unbleached pulp and, although this Company suffered more than others due to its loss of contracts with paper mills in Japan, a comparable member of the industry, insofar as being affected by foreign dumping of pulps, would be——

Soundview Pulp Co., Everett, Washington

4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (Sec. 722 (B) (4)) change.

(a) On what date did commencement of business or change in character of business occur?

The Company's production capacity, and changes therein, together with a comparison of actual pro-

Exhibit A—(Continued)

duction and sales for the years 1935 to 1939 inclusive, is summarized as follows:

Unbleached Sulphite Pulp

Year	Tons		Sales
	Capacity	Production	
1935	63,000	54,402	53,387
1936	63,028	63,028	61,716
1937	63,377	63,377	59,480
1938	84,000	47,682	50,437
1939	115,000	94,416	96,485
January 1, 1940	128,136		

(c) Did the business reach, by the end of the base period the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, two years prior to the time the commencement or change occurred?

The Company's production capacity which the Company believes should be recognized in the base period years was not reached until January 1, 1940 as shown in the summary above. Furthermore, operations for the year 1935 are not comparable to those of subsequent years due to the transfer in that year of the Company's main production from Everett to Bellingham and the change in that year from the production of bleached pulp to unbleached pulp.

Exhibit A—(Continued)

EXHIBIT "A"						August 26, 1937	
PUGET SOUND PULP & TIMBER CO.							
Details of Sales Commitments							
June 1, 1937-1938-1939							
Order & Customers	Total Commitments	Del'd. to 6/1/37	To Be Shipped	Price Per Ton	Gross \$ on Whole Commitment	Gross \$ to Be Delivered	
50 Nihon Seishi.....	5,600	1,120	4,480	\$57.81	\$ 323,736.00	\$ 258,988.80	
63 Nihon Seishi.....	1,568		1,568	57.81	90,646.08	90,646.08	
38 Nihon Seishi.....	1,120		1,120	57.81	64,747.20	64,747.20	
62 Nihon Seishi.....	8,400		8,400	57.81	485,604.00	485,604.00	
62 Nihon Seishi.....	8,400		8,400	73.50	617,400.00	617,400.00	
	25,088	1,120	23,968		\$1,582,133.28	\$1,517,386.08	
45 Mitsubishi.....	5,936	4,057	1,879	50.00	296,800.00	93,950.00	
54 Mitsubishi.....	224		224	45.00	10,080.00	10,080.00	
55 Mitsubishi.....	392		392	46.00	18,032.00	18,032.00	
55 Mitsubishi.....	392		392	47.00	18,424.00	18,424.00	
53 Mitsubishi.....	8,400		8,400	50.00	420,000.00	420,000.00	
64 Mitsubishi.....	8,400		8,400	75.00	630,000.00	630,000.00	
67 Mitsubishi.....	8,400		8,400	77.00	646,800.00	646,800.00	
65 Naniwa Seishi.....	1,680		1,680	75.00	126,000.00	126,000.00	
	33,824	4,057	29,767		\$2,166,136.00	\$1,963,286.00	

Exhibit A—(Continued)

Order & Customers	Total Commitments	6/1/37 Del'd. to	To Be Shipped	Price Per Ton	Gross \$ on Whole Commitment	Gross \$ to Be Delivered
41 Tomeogawa.....	1,344	773	571	\$69.15	\$ 92,937.60	\$ 39,484.65
56 Tomeogawa.....	1,120		1,120	69.15	77,448.00	77,448.00
57 Tomeogawa.....	2,520		2,520	69.15	174,258.00	174,258.00
	4,984	773	4,211		\$ 344,643.60	\$ 291,190.65
43 Nihon Shigyo.....	1,176	784	392	70.30	82,672.80	27,557.60
58 Nihon Shigyo.....	1,120		1,120	70.30	78,736.00	78,736.00
59 Nihon Shigyo.....	2,016		2,016	70.30	141,724.80	141,724.80
	4,312	784	3,528		\$ 303,133.60	\$ 248,018.40
49 Taisho Kogyo.....	1,120	291	829	59.00	\$ 66,080.00	48,911.00
61 Taisho Kogyo.....	1,120		1,120	59.00	66,080.00	66,080.00
60 Taisho Kogyo.....	2,240		2,240	75.00	168,000.00	168,000.00
	4,480	291	4,189		\$ 300,160.00	\$ 282,991.00
Total—Japan.....	72,688	7,025	65,663		\$4,696,206.48	\$4,302,872.13
China—1937.....	4,569		4,569	Av. \$48.03	\$ 219,460.30	\$ 219,460.30
China—1938—5826.....	2,688		2,688	75.00	201,600.00	201,600.00
Total—China.....	7,257		7,257		\$ 421,060.30	\$ 421,060.30
Grand Total.....	79,945	7,025	72,920		\$5,117,266.78	\$4,723,932.43

Exhibit A—(Continued)

PUGET SOUND PULP AND TIMBER CO.

Summary of Information With Respect to Application of Section 722

	1936	1937	1938	1939
Plant capacity January 1, 1940—tons.....	128,136	128,136	128,136	128,136
Actual tons sold during year.....	61,716	59,480	50,437	96,485
Additional tonnage which could have been sold under normal conditions based on 1940 capacity.....	66,420	68,656	77,699	31,651
Profit per ton realized.....	\$ (1) 2.28	\$ (2) 8.53	\$ (3) 6.74	\$ (5) 3.58
Profit per ton which would have been realized under normal conditions	(1) 2.28	(2) 8.53	(4) 25.11	(6) 11.84

(1)—Based on average selling price of \$36.96 per ton (average selling price per ton in 1936 based on Atlantic Seaboard prices was \$41.25)

(2)—Based on average selling price of \$45.71 per ton (average selling price per ton in 1937 based on Atlantic Seaboard prices was \$50.63)

(3)—Based on average selling price of \$42.46 per ton (average selling price per ton in 1938 based on Atlantic Seaboard prices was \$46.42)

(4)—See item (3). A profit of \$25.11 would have been realized had actual contracts with Japanese concerns been consummated, such contracts having been negotiated at an average of \$65.53 per ton F.O.B. west coast. From published statistics there were exported to Japan in 1938 approximately 1035 tons of pulp at \$64.75 per ton.

Exhibit A—(Continued)

(5)—Based on average selling price of \$38.42 per ton (average selling price per ton in 1939 based on Atlantic Seaboard prices was \$41.00 per ton)

(6)—See item (5). A profit of \$11.84 per ton would have been realized had average selling prices for the years 1935 to 1938 been maintained and had there been no foreign dumping at subsidized prices and low exchange rates.

Increased profit which would have been realized if plant capacity had been that of January 1, 1940 and if there had been no abnormalities in the base period as referred to in notes (4) and (6) above—less income tax thereon.....

\$130,134.66 \$503,410.39 \$2,522,636.17 \$ 960,805.43

Actual base period excess profits net income per form 1121....

20,292.14 408,084.52 8,886.44 200,041.98

Excess profits net income for base period after adjustments authorized under Section 722.....

\$150,426.80 \$911,494.91 \$2,531,522.61 \$1,160,847.41

Excess profits credit:

Total 4 years as above.....

Average

Average limited to 95% of income for the year 1939

(95% of \$1,160,847.41)

\$4,754,291.73

1,188,572.94

1,102,805.04

Exhibit A—(Continued)

PUGET SOUND PULP AND TIMBER CO.

Computation of Excess Profits Tax After Benefit of Section 722
for Year Ended December 31, 1942

Excess profits net income for 1942..... \$2,537,161.70

Less:

Specific exemption\$ 5,000.00

Excess profits credit as computed
on preceding schedule under

Section 722 1,102,805.04 1,107,805.04

Adjusted excess profits net income..... \$1,429,356.66

Excess profits tax—90% of \$1,429,356.66..... 1,286,420.99

Mr. Winter: What counsel had in mind—and we do not urge otherwise—counsel wanted to eliminate any inference that the plaintiff in this action was filing a non-meritorious claim for deferment under 722; and I think the record shows they are still trying to prosecute it. They thought it must have had some merit, and it was not merely for the purpose of delaying payment of interest. I don't think the question is material. It is our position, as I tried to explain to the Court, that \$135,000 is assessed as a deficiency and that the Act and Regulations and legislative history show that interest on a deficiency accrues from the due date although the payment at that time may be deferred. That is the sole issue in the case. That is what the legislative intent and legislative action amounted to. In other words, the taxpayer owed one million five hundred thousand dollars as of March 15, 1944. Under the

Act if he had a claim under 722, he could defer a certain percentage until that claim was acted upon.

The Court: Will counsel expect in their brief to refer to what effect if any the pending petition before the Tax Court will have? [17]

Mr. Winter: No.

The Court: —in this proceeding?

Mr. Winter: No, that has no effect here whatsoever.

The Court: Will both sides agree to that?

Mr. Winter: Your Honor has merely got to decide whether the law requires a taxpayer to pay interest on a deficiency or on the amount which is deferred from the time the Commissioner rules upon the claim. Do I make myself clear?

The Court: All right. I asked the question whether it did.

Mr. Winter: No, your Honor.

The Court: It was put in evidence that there was such an application pending, and I, of course, had to take note of the fact that it was put in evidence. Now I am told by counsel that while in evidence I may ignore it.

Mr. Winter: I don't think it has any bearing. I think it is immaterial so far as your Honor's decision is concerned. I haven't read counsel's brief on the matter, but it is our position that interest is collectable on that deficiency even though the payment was deferred, and then when the claim is acted upon it then becomes a deficiency as of the

date it was due, March, 1943 and not September, 1944, when the [18] claim was acted upon. We don't collect interest,—I mean the taxpayer does not collect interest on his claim when we overassess under 722, but we claim interest—may I must read from the legislative history?

The Court: You may.

Mr. Coster: May I interrupt?

The Court: Surely.

Mr. Coster: Since I introduced the testimony I can very well conceive some taxpayer thought they could use some money by filing a claim that had no merit, and by filing such a claim for deferment of payment of the tax,—that in such a case a taxpayer ought to pay interest for the time he deferred the payment. In this particular case I introduced the testimony merely that we thought we had a bona fide claim and still do and it was not merely a facetious type of claim to bring about deferment of the tax. That was the only purpose of the testimony.

Mr. Winter: We have made no contention here that it was not. Here is what the report says,—the report said—this was the report when they were extending time to file claims under 722 of the Internal Revenue Code and making special provisions with respect to interest on overpayments and deficiencies attributable to final determination under that section. [19]

“The committee amendment of section 1 is designed to make appropriate provision for applica-

tion of the section where there has been deferment of part of the excess-profits tax under section 710 (a)(5) of the code. In general, a taxpayer must pay its tax, computed without any benefit, from the application of section 722. Since, under the bill, taxpayers which have paid their taxes in full, without the application of section 722, will receive any refunds with interest only for the periods provided, taxpayers who have availed themselves of the deferment provided by section 710(a)(5) should be required to pay interest on the amount by which they have underpaid."

It is our position that they could file a claim, and they deferred payment of the \$135,000, and they should have paid the \$135,000 because the claim was found without merit by the Commissioner.

The Court: I am assuming you are going to make reference to this in your brief.

Mr. Winter: Yes, but I was trying to show our position as to the legal question involved.

The Court: In other words, this is a preview of what your brief will be.

Mr. Winter: I have asked the Attorney General to write it. I haven't got time. That is the reason I want [20] a short time; maybe I can get them busy.

The Court: This is a synopsis of a forecast of what you hope the Attorney General will say.

Mr. Winter: There are no cases on the subject. It is a case of first impression.

The Court: Counsel have told me that the matter

is a matter of first impression. That is, counsel have let me know that I will have no help from any other court. In addition, counsel is stating that it was a matter of first impression have said that the question was very technical. I think I will ask the plaintiff to have the reporter run off a transcript of what has occurred this afternoon. By the time these briefs are in it is unlikely that I will remember just exactly what has taken place today, and I will charge the plaintiff with that responsibility.

Mr. Coster: I think Mr. Evans already ordered a transcript.

The Court: You expected what I have requested. There is one thing more I might say to counsel. While in the first instance I am very agreeable to the presentation of this matter by a written brief, it might be that after the briefs are in that I would feel that I would profit by some oral presentation. An oral presentation now might not be helpful, but after I [21] have read the briefs such could be of great assistance. Would it be proper for me to call on counsel for oral argument if I find I have need of it.

Mr. Coster: It would be a pleasure, your Honor.

The Court: I don't wish to ask an unreasonable favor of counsel.

Mr. Winter: Mr. Coster is in San Francisco, but his associate legal counsel are here.

The Court: They might meet with Mr. Winter in the oral presentation later. I might like that.

Mr. Coster: We will be glad to do that.

The Court: All right, gentlemen. Good night.

CERTIFICATE

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed Nov. 20, 1948.

[Title of District Court and Cause.]

March 31, 1949, 9:30 o'Clock A.M.

Black, J.

COURT'S ORAL DECISION

The Court: In Puget Sound Pulp & Timber Company, plaintiff, vs. Clark Squire as United States Collector of Internal Revenue for the State of Washington, defendant, the plaintiff brought this action against the defendant for the recovery of approximately twelve thousand dollars representing interest assessed and collected on the deficiency of excess profit taxes for the taxable year 1942. The brief of the defendant concisely states

the question presented as follows: "Was taxpayer required to pay interest on 1942 excess profit taxes deferred under Section 710(a)(5) of the Internal Revenue Code during the pendency of its application for relief under Section 722 of the Internal Revenue Code?"

The defendant's brief states further: "The facts are not in dispute. They are substantially as follows:

"On March 15, 1943 taxpayer filed its income and excess profits tax return for the calendar year 1942. The return disclosed that taxpayer was permitted, under Section 710(a)(5) of the Internal Revenue Code, a deferment of \$135,203.36 in excess profits taxes. Taxpayer filed an application for relief under Section 722 of the Internal Revenue Code, which was denied on November 30, 1944 (August 29, 1940) and the above excess profits taxes were assessed (on September 30, 1944) with interest in the amount of \$11,880.12. The tax and interest were paid (November 29, 1944). This suit is for the recovery of only the interest paid on the deferred payment of excess profits taxes from March 15, 1943 to November 29, 1944."

As stated by defendant's brief and likewise by plaintiff's brief, there is no dispute between the parties with regard to the facts involved in this action. All of the facts material to the determination of the issue of law involved were alleged in the complaint and were admitted by the answer or brief or proved at the trial as true.

This action is brought pursuant to Section 24 of the Judicial Code, U.S.C.A. Title 28, Sec. 41(5) for the recovery of interest.

Plaintiff is a corporation with its principle place of business at Bellingham, Washington.

The defendant's notice and demand upon plaintiff for payment of said \$135,203.36 and the interest thereon were dated September 30, 1944. The plaintiff complied with the requirements for the bringing of this action.

The excess profits tax was imposed at the rate of ninety per cent upon all net income in excess of the credit allowed by law. Congress realized that such a tax would be discriminatory against certain corporate taxpayers which had inadequate credit. For the purpose of avoiding or at least mitigating such discrimination Congress made provision for a constructive credit for those corporations which came within the provisions of Section 722 of the Internal Revenue Code. Since the relief under Section 722 was available only after payment of the tax and upon application for refund, it was considered that in order to make the relief of practical benefit a provision should be made for the deferment of a portion of the excess profits tax under certain circumstances when more than fifty per cent of the corporation's income was subject to excess profits tax. In such connection such Section 710(a) (b) of the Internal Revenue Code was enacted. Such section gave to the corporation within its

terms the right of deferring an amount equal to thirty-three per cent of the reduction claimed.

Plaintiff in connection with the 1942 tax was within the provisions of Section 710(a)(5) and elected to reduce the amount of excess profits tax otherwise payable by it by thirty-three per cent.

The evidence establishes without contradiction, and the Court finds as a matter of fact that the plaintiff's claim for relief under Section 722 was a bona fide claim and was made in good faith. Plaintiff believed and under the evidence had the right in all honesty to believe that plaintiff was entitled to the relief it claimed.

I am not finding nor do I intend to find that the Commissioner was in error on August 29, 1944 when he denied such relief. I have no authority to pass upon that. It is not before me. The question before me is whether or not when the Commissioner of Internal Revenue on August 29, 1944 rejected plaintiff's claim for relief under Section 722 and on September 30, 1944 made demand upon plaintiff for payment of the \$135,203.36, plus interest at six per cent from March 15, 1943, he was mistaken or correct as to the time he fixed for the commencement of the interest liability.

The defendant insists that under the clear reading of the statute, that under the clear statement of the intention of the statute applicable as found in the report of the senate committee, under the ruling of the Commissioner and the administrative practice, and under logic, common sense, consist-

ency and fairness, that the Commissioner was right. In other words, the defendant insists that interest beginning at any later date than March 15, 1943 would have been contrary to law, to common sense, and contrary to fairness with respect to other taxpayers.

Plaintiff on the contrary as urgently contends that the law is clear to the effect that no interest was chargeable before September 30, 1944, that the congressional history of the passage of the Act does not support defendant's position, that the defendant's position is inconsistent with other provisions of the law and other holdings of the Commissioner, and moreover is neither fair nor equitable.

Section 722 of the Internal Revenue Act at the time plaintiff was compelled to pay the interest involved here appeared as Section 722, Title 26, USCA. At the same time Section 710(a)(5) of the Internal Revenue Act was 710(a)(5), Title 26, USCA.

In Section 710(a)(5) we find the following sentence, "For the purpose of Section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return."

In such Section 710(a)(5) there is the further provision as to the deferred amount that if any portion thereof "is in excess of the reduction in tax finally determined under Section 722, such excess may be assessed at any time before the expiration of one year after such final determination."

In neither Section 722 nor Section 710(a)(5) is there any provision as to interest payment. Both parties agree that Section 292 of Title 26, U.S.C.A. as amended by the Act of December 17, 1943, is vital in determining when the interest legally commences. Subdivision (a) states the general rule that "Interest * * * shall be collected * * * from the date prescribed for the payment of the tax." Subdivision (b) reads:

"(b) Deficiency Resulting From Relief Under Section 722.—If any part of a deficiency for a taxable year beginning January 1, 1942 is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning After December 31, 1941 is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 for any taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under Section 710(a)(5), and excluding, in case the taxpayer has availed itself of the benefits of Section 710(a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of excess profits tax arising from the operation of Section 722), no interest shall be assessed or paid with respect to

such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later."

Subdivision (b) therefore consists of two sentences.

Every taxpayer is presumed to know what the law is and is presumed to know what the law means. I confess that the first sentence might easily puzzle not only the layman taxpayer but the ordinary attorney. The second sentence, which is the long one, is the sentence which defendant contends clearly establishes in unmistakable language the correctness of defendant's position. If the first sentence is not too clear, what must be said as to the second? Split infinitives are abhorred by the scholastic grammarian. The second sentence offends not only the grammarian but either the ear or the eye of any untechnical individual not an expert in tax phraseology because the second sentence is a split sentence. Its meaning can only be approximated by excluding that portion that was injected into it by way of amendment. By excluding that portion beginning "(excluding * * *" and ending "* * * 722)" we find that the meaning of the second sentence is substantially akin to the meaning of the first sentence except as to the time when interest shall accrue. The first sentence says that as to a deficiency beginning prior to January 1, 1942 no interest shall be assessed or paid. The second sentence as to such a deficiency in effect says that no interest shall be assessed or paid with re-

spect to such deficiency at least prior to September 16, 1945. Now, if the part which was injected to that long second sentence by amendment had not been interpolated into it, this plaintiff would not have been compelled to pay interest on the deficiency for any period beginning prior to September 16, 1945. Payment could have commenced later than that. It is the position of the defendant that the portion injected into that long sentence by splitting it clearly established that the interest was to begin on March 15, 1943. But the part put in by amendment in no way says such. It merely says that a deficiency portion of a deferment under Section 710(a)(5) shall not be freed of interest until a date as late as September 16, 1945. It says no more.

Defendant in this case on page 3 of its brief concedes that if the statutory provisions as to the interest payment are clear there is no necessity to examine legislative history. Defendant's position is that the statute is clear and that therefore there is no reason to examine legislative history. The defendant, however, does examine legislative history because it says that while the statute is clear to defendant and everyone else, the plaintiff in effect pretends it is not clear to plaintiff. Therefore, the defendant refers to the statutory history so that the plaintiff as well as everyone else will be convinced, and the defendant says the statutory history is clear.

And in such connection the defendant points out

what the report of the Senate Committee says and then adds these words "(meaning, of course, from the date of deferment)." If the report of the Senate Committee had employed those words, then, of course, the Senate Committee's report would have been as clear as defendant claims it is. But since the defendant felt compelled to inject those words, to-wit, "meaning, of course, from the date of deferment," it seems to me that defendant must have grave doubt of the clearness of the legislative history.

In the Senate Committee's report we find this language as to the amendment:

"Since under the bill taxpayers who have to pay their taxes in full without the application of Section 722 will receive any refunds with interest only for the periods provided, taxpayers who have availed themselves of the deferment provided by Section 710(a)(5) should be required to pay interest on the amount for which they have unpaid."

This statement was in justification of injection by amendment of the language in the middle of the second sentence of subdivision 5, Section 292. The Senate Committee report contains extracts from the report of the Committee on Ways and Means of the House of Representatives in connection with this bill, which report was upon the bill before the proposed amendment by splitting the second sentence as above. In that bill the House Committee says:

"The bill provides that no interest shall be

allowed on overpayments attributable to determinations under Section 722 with respect to taxable years beginning in 1940 and 1941. Correspondingly, no interest will be collected on deficiencies resulting from such determinations for those years.”

That provision of the House Committee’s report expresses the fairness and equity of not compelling the taxpayer to pay interest if the Government does not pay interest on refunds. That particular provision of the bill was accepted by the Senate and made law. It seemed to recognize the equity, consistency and fairness of such a provision as to tax for 1940 and 1941.

The House Committee’s report, found in the Senate Committee’s report, further says:

“With respect to 1942 and subsequent years, interest on overpayments and deficiencies arising from the application of this section is now allowed for any period prior to September 16, 1945 or prior to one year after the filing of the application, whichever is the later.”

Therefore, if the law had been left as the House Committee recommended it, the defendant not only would not have been able to have collected interest from March 15, 1943, but would not have been able to have collected interest from the plaintiff until a period beginning September 16, 1945. But if the provision of the law as it is is clear, equitable and consistent as to 1940 and 1941, it is difficult for me to comprehend how it would be unfair not to begin

interest on the 1942 taxes as of March 15, 1943. The Senate Committee report does not say that the interest is to be chargeable from March 15, 1943. It merely says that by the amendment interest will be chargeable on the deficiency. Since it says no more, clearly, that interest will begin when it should begin according to law.

Plaintiff says that according to the clear statement of the law the interest does not begin until it is payable. The Senate Committee report does not disagree with that contention. The House Committee report in no wise disagrees with that contention. I am satisfied that the law is as plaintiff contends, that interest was not chargeable until the deferred deficiency became payable. Under the law the deferred deficiency became payable in September 1944, when the Commissioner demanded payment.

I have not overlooked the decisions cited by defendant. I have been particularly intrigued by defendant's insisting that logic, common sense and equity supported its position and then citing *Brandtjen and Kluge vs. United States*, 78 Fed. Supplement 509. In that decision it appears that the Collector collected a certain amount from the taxpayer and also certain interest. Thereafter it was found that the Collector should refund the tax collected. The Collector refused to refund the interest. The taxpayer contended that if the tax should be refunded, the interest should be refunded. The taxpayer sued. The defendant thereafter did

not rely on logic, common sense or equity. The defendant there said that Congress had not said that interest was to be refunded and that therefore the Collector would not refund the interest. The defendant in effect there said that if Congress had wanted the interest refunded, Congress could easily have said it. The defendant convinced the Court that the Court had no right to consider logic, common sense or equity, and in closing the Court says this:

“Plaintiff’s argument is appealing, forceful and persuasive of the lack of logic in the Bureau’s refusal to return the interest when the tax is refunded. However, the law often borders on the illogical where the particular ‘statute does not descend to minutiae’ and specifically state that ‘an over-assessment of any tax’ includes interest. If it were intended to include interest, Congress could have so provided. The Court cannot supply the lacking legislation in this respect.”

Paraphrasing a portion of the closing words of that opinion I may say that if Congress had intended that deferment intended to be an aid to the taxpayer was to bear interest not from the time the deferment became payable but from the time the tax would have been payable if there had been no deferment, Congress could have so provided. This Court cannot supply that lacking legislation.

The contention of the plaintiff is easily followed, that the statute provides that the interest starts when the amount becomes payable. The amount

became payable on September 30, 1944. My decision must be to that effect. So construing the clear language of the statute, the legislative history is likewise consistent and logical. Under the Act as originally proposed this deferment would not have drawn interest as shown by the House report, until at least September 16, 1945. The Senate thought there should be interest payable. Consistent with the statute, the Senate Committee undoubtedly thought interest should be payable from the time the deferred amount became payable. That construction makes the legislative history consistent and logical and in accordance with common sense.

I may say that the defendant has pointed out more than one instance of discrimination between taxpayers as to interest allowable by the statute and allowable by the interpretation of the Commissioner as to another extension. One of those discriminations allowable under language found in the Act is awfully close to the language which the defendant contends necessarily means something it does not say in order to avoid the discrimination which is allowed by nearby language. Under this interpretation the defendant is allowed to pay interest from September 30, 1944 to November 30, 1944. If it were not for the amendment, it would not have been necessary for the defendant to pay that interest.

Neither the Act nor the legislative history calls for interest for any period before the deferred amount became payable. I recognize that the Com-

missioner's ruling and practice are not in accord with what I have said but the Commissioner's ruling and practice, while ordinarily presumptively correct and while always persuasive, are neither correct nor persuasive when the clear statute provides differently. I confess that the second sentence of subdivision B of Section 292, Title 26 USCA, on superficial reading makes the contention of the defendant seem plausible. But that second sentence can mean nothing except as it is split apart and analyzed. It is regrettable that Congress did not leave the sentence as it was and add a second sentence so that a superficial reading would not mislead or at least confuse.

Plaintiff is entitled to judgment for the interest paid for the period prior to September 30, 1944.

Findings may be presented.

[Endorsed]: Filed Apr. 15, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

Disbursements

Amount Claimed:

Clerk's fees—\$15.00.

Marshal's fees—\$2.60.

Attorney's fees—\$20.00.

Taxed—\$37.60.

Taxed June 23, 1949.

MILLARD P. THOMAS,

By /s/ TRUMAN EGGER,

Chief Deputy Clerk.

United States of America,

Western District of Washington—ss:

Robert H. Evans being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled cause; and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ ROBERT H. EVANS.

Subscribed and sworn to before me, this 22nd day of June, 1949.

[Seal] /s/ TRUMAN EGGER,
Chief Deputy Clerk U.S. Dis-
trict Court, Western Dis-
trict of Washington.

To Thomas R. Winter, Special Assistant to the
Chief Counsel, Bureau of Internal Revenue, At-
torney for Defendant:

You will please take notice that on Wednesday,
the 22nd day of June, 1949, at the hour of 9:30
o'clock a.m., application will be made to the Clerk
of said Court, to have the within memorandum of
costs and disbursements taxed pursuant to the rule
of said Court, in such case made and provided.

.....,
Attorney for Plaintiff.

Due service of the within and foregoing Memo-
randum of Costs and Disbursements and notice of
the taxation thereof by the receipt of a true copy
thereof, hereby is admitted in behalf of all parties
entitled to such service by the Rules of Court, this
22nd day of June, 1949.

/s/ THOMAS R. WINTER.

[Illegible]

/s/ THOMAS R. WINTER.

[Endorsed]: Filed June 23, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Upon the basis of the pleadings, the evidence submitted at the trial of this proceeding, the briefs and argument of counsel, the Court renders the following:

Findings of Fact

1. Plaintiff sues to recover \$11,880.12 alleging same represents interest paid by plaintiff to the defendant as Collector of Internal Revenue on an excess profit tax deficiency for the calendar year 1942 in the sum of \$135,203.36.

2. The said tax deficiency represented an amount of excess profits tax, payment of which the plaintiff had deferred as authorized by the provisions of Section 710 (a) (5) of the Internal Revenue Code.

3. That of said sum of \$11,880.12 the sum of \$11,640.98 represents interest paid by plaintiff to defendant on November 30, 1944, computed on said tax deficiency of \$135,203.36 at the rate of 6% per annum from March 15, 1943, to August 29, 1944.

4. This action arises under the Internal Revenue Laws of the United States and is brought pursuant to Section 24 of the Judicial Code, U.S.C. Title 28, Section 41(5) for the recovery of interest assessed against and collected from plaintiff.

5. Plaintiff is a corporation with its principal place of business in the City of Bellingham, State of Washington, and the Western District of Washington.

6. Defendant is, and was at all times material hereto, the Collector of Internal Revenue in the State of Washington, is a resident of the Western District of Washington and is the person to whom the interest sought to be collected was paid.

7. Plaintiff duly filed its excess profits tax return for the year 1942 with defendant, as Collector of Internal Revenue. Said return disclosed excess profits net income computed without reference to Section 722 of the Internal Revenue Code in the amount of \$1,884,586.83. Plaintiff's normal tax net income for the year 1942, computed without the credit provided in Section 26(e) of the Internal Revenue Code was \$2,533,133.02. On its excess profits tax return for 1942, plaintiff claimed the benefits of Section 722 of the Internal Revenue Code and claimed a reduction in excess profits taxes in the amount of \$409,707.16. Plaintiff's claim for the benefits of Section 722 was a bona fide claim and was made in good faith.

8. Plaintiff elected to reduce the amount of excess profits tax computed without the benefit of Section 722 of the Internal Revenue Code by the amount of \$135,203.36.

9. Plaintiff was entitled to a credit against its

excess profits tax for 1942 in the amount of \$150,000 for debt retirement and elected to take said credit in its return. After the deduction of said \$135,-203.36 pursuant to the provisions of Section 710 (a)(5) of the Internal Revenue Code, and the debt retirement credit of \$150,000, plaintiff's remaining excess profits tax was \$1,410,924.79.

10. Said tax in the amount of \$1,410,924.79 was duly paid to defendant at the times and in the manner provided by law.

11. Plaintiff's profits for the year 1942 were renegotiated and as the result thereof, plaintiff's excess profits tax was reduced by the amount of \$119,492.48.

12. On August 29, 1944, the Commissioner of Internal Revenue determined that plaintiff was not entitled to relief under Section 722 of the Internal Revenue Code, rejected plaintiff's claim for relief under said Section 722 and assessed against plaintiff for the year 1942 additional excess profits taxes in the amount of \$179,199.48 which included the aforesaid \$135,203.36, payment of which had been deferred as aforesaid.

13. On October 14, 1944, plaintiff paid to the defendant the said additional taxes and all interest thereon excepting the interest in the sum of \$11,640.98, which was paid later as aforesaid.

14. Defendant's notice and demand upon plaintiff for payment of said \$135,203.36 and the interest thereon was dated September 30, 1944.

15. Plaintiff filed its claim for refund of interest paid on said \$135,203.36 in the amount of \$11,880.12 on or about November 30, 1944, and said claim was rejected by the Commissioner on or about March 21, 1945. Thereafter, this suit was duly filed.

16. No part of the said sum of \$11,640.98 sought to be recovered by plaintiff from the defendant has been refunded or credited to plaintiff.

Conclusions of Law

1. Interest does not start to run on an excess profits tax properly deferred under Section 710 (a)(5) of the Internal Revenue Code until the date prescribed for the payment of that tax. (Internal Revenue Code, Sections 729 and 292.)

2. March 15, 1943, is the date prescribed for payment of the excess profits tax for the calendar year 1942, (I.R.C. Sections 729 and 56) but where the taxpayer claims the benefit of Section 722 of the Internal Revenue Code and defers the payment of a portion of the excess profits tax under authority of Section 710 (a)(5) of the Internal Revenue Code, as in this case, the amount of the tax payable on March 15, 1943, is the excess profits tax reduced by the amount of the deferred tax. (I.R.C. Section 710 (a)(5).)

3. This deferred tax becomes payable only after the Commissioner of Internal Revenue rejects the claim for benefits under Section 722 and assesses the tax, and the date prescribed for its payment is

the date of the notice and demand from the Collector of Internal Revenue (I.R.C. Section 710 (a) (5), 271 and 272.)

4. The plaintiff became liable for the deferred tax of \$135,203.36 when the Commissioner of Internal Revenue rejected the plaintiff's claim for refund under Section 722 of the Internal Revenue Code on August 29, 1944, and assessed the said tax as a deficiency (I.R.C. Sections 710 (a) (5), 271 and 272) ; and the only date prescribed for the payment of that particular tax deficiency is the date of the notice and demand from the defendant as Collector of Internal Revenue which was September 30, 1944. (I.R.C. Sections 272 (b) and (c).)

5. Interest is collectible on said deferred tax only from the date prescribed for payment of said tax, i.e., September 30, 1944, to the date of payment (I.R.C. Section 292, 294 (b).) Since the plaintiff paid the said tax upon notice and demand from the defendant as Collector of Internal Revenue, it was not liable for any interest on said deferred tax, and the defendant wrongfully demanded and collected interest from plaintiff on said tax for the period March 15, 1943, to September 30, 1944. Since plaintiff is seeking to recover interest charged and paid on said deferred tax up to August 29, 1944, the plaintiff is entitled to recover the said sum of \$11,640.98.

The foregoing findings of fact and conclusions of law are ordered to be filed and made a part of

the record herein, and the Clerk of this Court is directed to enter judgment accordingly.

Signed at Seattle, Washington, this 11th day of July, 1949.

/s/ LLOYD L. BLACK,
U. S. District Judge.

O.K. as to Form & Figures.

/s/ THOMAS R. WINTER.
Presented for Signature & Entry.

By /s/ ROBERT H. EVANS,
Atty. for Plaintiff.

[Endorsed]: Filed June 23, 1949.

In the District Court of the United States in and
for the Western District of Washington

No. 2077

PUGET SOUND PULP & TIMBER CO.,
Plaintiff,

vs.

CLARK SQUIRE, United States Collector of In-
ternal Revenue for the State of Washington,
Defendant.

JUDGMENT

The cause having come on regularly for trial on October 20, 1948, before the Court, sitting without a jury, George H. Koster, Esq., and Robert H. Evans, Esq., appearing as attorneys for Plaintiff, and Thomas R. Winter, Special Assistant to the General Counsel for the Bureau of Internal Revenue, appearing as attorney for Defendant, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its findings of fact and conclusions of law and ordered that judgment be entered herein in favor of the plaintiff for overpayment of interest collected on an excess profits tax deficiency for the year 1942;

Now, Therefore, by virtue of the law and by reason of the findings and conclusions aforesaid,

It Is So Ordered, Adjudged and Decreed, that plaintiff do have and recover against the defendant

the sum of \$11,640.98, with interest thereon to be computed as provided by law at the rate of 6% per annum from November 30, 1944, to a date preceding the date of refund thereof by not more than thirty days; and plaintiff is entitled to costs and disbursements in this action expended in the amount of \$37.60.

The Court hereby certifies that there was probable and reasonable cause for the act of the defendant, the Collector of Internal Revenue, in demanding and collecting from the plaintiff the interest on the tax deficiency, for the refund of which interest this judgment is entered.

Dated at Seattle, Washington, this 11th day of July, 1949.

/s/ LLOYD L. BLACK,

Judge of the United States
District Court.

OK as to Form & Figures.

/s/ THOMAS R. WINTER,

Presented for signature & entry.

By /s/ ROBERT H. EVANS,

Atty. for Plaintiff.

[Endorsed]: Lodged June 23, 1949.

[Endorsed]: Filed and entered July 11, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Puget Sound Pulp and Timber Co., Plaintiff
Named Above, Evans, McLaren, Lane, Powell
& Beeks, and Robert H. Evans, Attorneys for
Plaintiff:

You, and Each of You, will please take notice
that the defendant, Clark Squire, United States
Collector of Internal Revenue for the State of
Washington, appeals to the United States Circuit
Court of Appeals for the Ninth Circuit from the
Judgment entered in this action on July 11, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ CHARLES R. WINTER,
Assistant to the Chief Counsel, Bureau of Internal
Revenue.

[Endorsed]: Filed Aug. 19, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To: The Clerk of the Above-Entitled Court:

Defendant Clark Squire, United States Collector of Internal Revenue for the District of Washington, by and through his attorneys of record, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, pursuant to Rule 75(a) of Rules of Civil Procedure, as amended, hereby designates the entire record in this case to be contained in the record on appeal.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of
Internal Revenue.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 19, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned, respective counsel for plaintiff and defendant in the above-entitled cause, that all of the original exhibits admitted in evidence at the trial of this cause, to wit: plaintiff's Exhibits 1 and 2, and defendant's Exhibit A and schedules attached, may be transmitted with the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ GEORGE H. KOSTER,

/s/ GEORGE V. POWELL,

Of Counsel for the Plaintiff.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of Internal Revenue, of Counsel for the Defendant.

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

ORDER

Upon stipulation of counsel and good cause appearing therefor, it is hereby

Ordered that the Clerk of this Court, and he is hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, with the transcript of record on appeal herein, the original exhibits in this cause, to wit: plaintiff's Exhibits 1 and 2, and defendant's Exhibit A and schedules attached.

Done in Open Court this 21st day of September, 1949.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure as Amended, I am transmitting herewith as the record on appeal in the above-entitled cause, pursuant to designation of counsel, all of the original pleadings on file and of record in said cause in my office at Seattle, as set forth below, and that said pleadings, together with the exhibits admitted in evidence at the trial of said cause, numbered Plaintiff's 1 and 2, and Defendant's A, constitute the record on appeal from the Judgment filed and entered July 11, 1949, in plaintiff's behalf, to the United States Court of Appeals at San Francisco, California, to wit:

1. Complaint.
2. Summons with Marshal's return of service.
3. Stipulation Extending Time to Feb. 15, 1947, to plead.
4. Order Extending Time to February 15, 1947, to plead.

5. Answer.
6. Stipulation Extending time for assignment of cause until called for settling by counsel.
7. Order Striking Cause from Trial Calendar.
8. Order Transferring Cause to Northern Division.
9. Motion to Place Cause on Trial Calendar.
10. Notice of Hearing on above motion.
11. Senate Report No. 508, Extending the Time Within Which Applications Under Section 722 of the Internal Revenue Code Must Be Made.
12. Bulletin on Section 722 of the Internal Revenue Code.
13. Plaintiff's Brief.
14. Brief for the Defendant.
15. Court Reporter's Transcript of Hearings for Perpetuation of Testimony of Lawson P. Turcotte on October 20, 1948.
16. Plaintiff's Reply Brief.
17. Court Reporter's Transcript of Court's Oral Decision of March 31, 1949.
18. Memorandum of Costs and Disbursements.
19. Findings of Fact and Conclusions of Law.
20. Judgment signed and entered July 11, 1949.
21. Notice of Appeal.

22. Designation of Contents of Record on Appeal.

23. Stipulation Transmitting original exhibits as part of Record on Appeal.

24. Order Transmitting Original Exhibits as part of Record on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 21st day of September, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12368. United States Court of Appeals for the Ninth Circuit. Clark Squire, United States Collector of Internal Revenue for the State of Washington, Appellant, vs. Puget Sound Pulp & Timber Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 26, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12368

CLARK SQUIRE, Collector of Internal Revenue,
Appellant,

vs.

PUGET SOUND PULP & TIMBER COMPANY,
Appellee.

STATEMENT OF POINT UPON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF THE RECORD TO BE
PRINTED

The District Court erred in concluding and holding that taxpayer was not liable to the United States for interest on deferred excess profits taxes for the taxable year 1942 from March 15, 1943, the date taxpayer's return was filed, to August 29, 1944, the date the Commissioner of Internal Revenue determined that taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code.

Appellant designates the entire record for printing.

J. CHARLES DENNIS,
United States Attorney,
Attorney for Appellant.

[Endorsed]: Filed Oct. 14, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION
RE DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

It is hereby stipulated by and between the undersigned, of respective counsel for appellant and appellee in the above-entitled cause, that since the record in this cause contains the following items which were filed with the trial court but were not received as exhibits in the case, the same need not be printed and are hereby excepted from the designation of record for printing heretofore filed, to wit:

- (1) The report to accompany H.R. 3363, consisting of five pages;
- (2) Bulletin on Section 722 of the Internal Revenue Code, consisting of 170 pages;
- (3) Plaintiff's brief of 20 pages;
- (4) Respondent's brief of 12 pages;
- (5) Plaintiff's reply brief of nine pages; and
- (6) All correspondence of the Clerk of the District Court.

Dated this 24th day of Oct., 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of
Internal Revenue, of Counsel for Appellant.

/s/ ROBERT H. EVANS,

/s/ GEORGE H. KOSTER,
Of Counsel for Appellee.

[Endorsed]: Filed Oct. 28, 1949.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant

vs.

PUGET SOUND PULP & TIMBER CO.,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLANT

THERON LAMAR CAUDLE,
Assistant Attorney General.

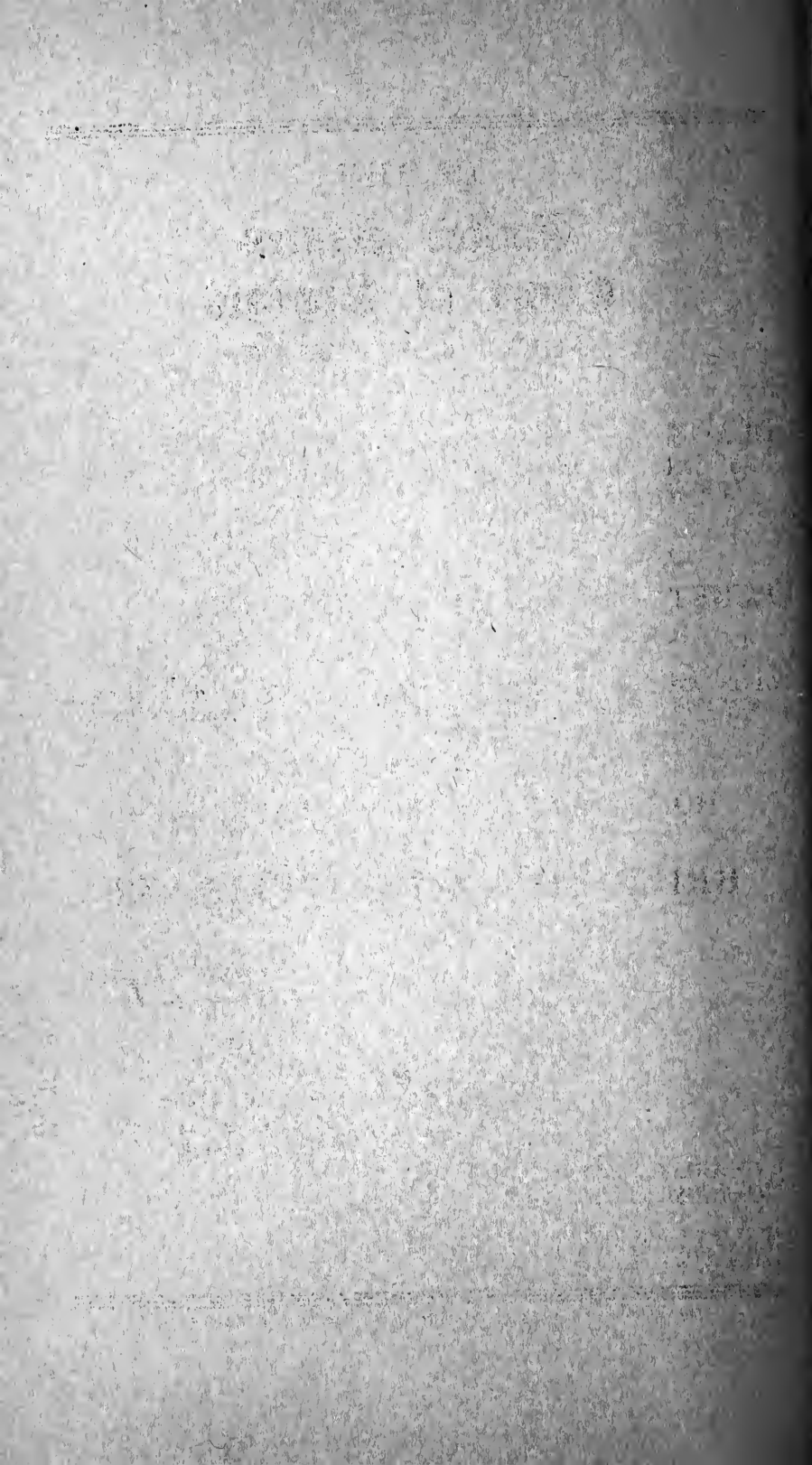
ELLIS N. SLACK,
A. F. PRESCOTT,
JAMES P. GARLAND,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

FILED

JAN 11 1950



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant

vs.

PUGET SOUND PULP & TIMBER CO.,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

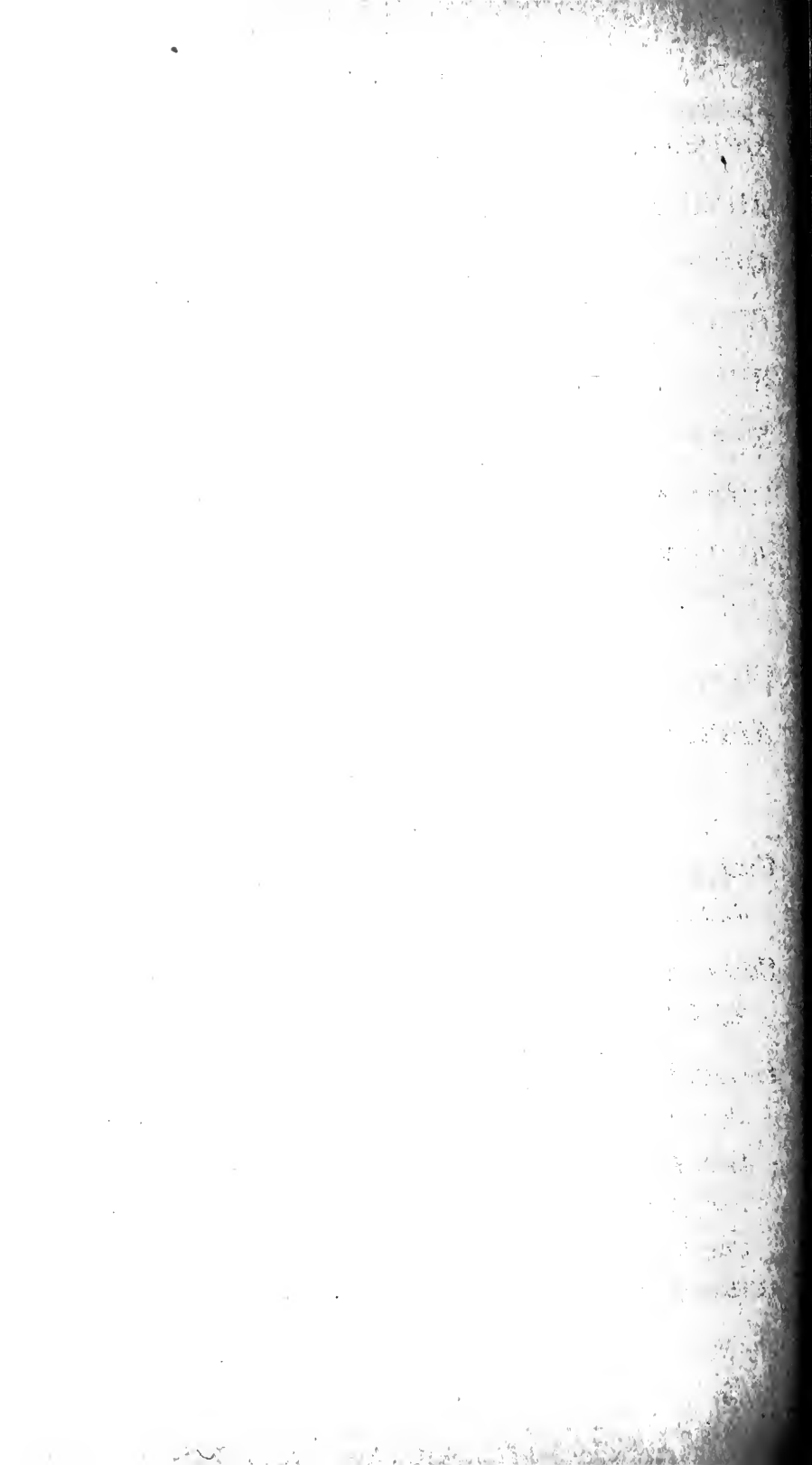
BRIEF FOR THE APPELLANT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
JAMES P. GARLAND,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON



INDEX

	Page
OPINION BELOW.....	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
STATEMENT OF POINT TO BE URGED....	4
SUMMARY OF ARGUMENT.....	5
 ARGUMENT:	
The assessed deferred excess profits taxes bore interest from the date of deferment.....	6
CONCLUSION	14
APPENDIX	15

CITATIONS

Case:

<i>Jones v. Johnson</i> , 176 F. (2d) 693.....	11
--	----

Statute:

28 U.S.C. Sec. 1340.....	2
--------------------------	---

Internal Revenue Code:

Sec. 26 (26 U.S.C. 1946 ed., Sec. 26).....	7, 9
Sec. 271 (26 U.S.C. 1946 ed., Sec. 271).....	7
Sec. 292 (26 U.S.C. 1946 ed., Sec. 292).....	5
Sec. 710 (26 U.S.C. 1946 ed., Sec. 710).....	2, 17
Sec. 722 (26 U.S.C. 1946 ed., Sec. 722).....	2, 18

CITATIONS (*Continued*)

Page

Sec. 3771 (26 U.S.C. 1946 ed., Sec. 3771) 8

Miscellaneous:

89 Cong. Record, Part 6, p. 8191 9

H. Rep. No. 722, 78th Cong., 1st Sess., p. 2 10

S. Rep. No. 508, 78th Cong., 1st Sess., p. 2 13

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant

vs.

PUGET SOUND PULP & TIMBER CO.,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 83-96) is
not reported.

JURISDICTION

This appeal involves interest in the amount of
\$11,640.98 paid on excess profits taxes for the cal-
endar year 1942. (R. 105-106.) The interest in ques-

tion was paid to the Collector of Internal Revenue, appellant, on November 30, 1944. (R. 99.) Taxpayer filed a claim for refund, based upon the grounds sued upon, on November 30, 1944. (R. 102.) The claim for refund was rejected by the Commissioner of Internal Revenue on March 21, 1945. (R. 102.) Suit was brought within the time provided in Section 3772 of the Internal Revenue Code or on October 18, 1946 (R. 2-16), for the recovery of the interest claimed. Jurisdiction was conferred on the District Court by 28 U.S.C., Sec. 1340. Judgment was entered on July 11, 1949. (R. 105-106.) Notice of appeal was filed August 19, 1949 (R. 107), pursuant to the provisions of 28 U.S.C., Sec. 1291.

QUESTION PRESENTED

Was taxpayer required to pay interest on excess profits taxes deferred under Section 710 (a) (5) of the Internal Revenue Code during the pendency of its application for relief under Section 722 of the Internal Revenue Code, where its application for relief was denied?

STATUTE INVOLVED

The pertinent statute will be found in the Appendix, *infra*.

STATEMENT

The facts were not in dispute. The pertinent facts were found (R. 99-102) as follows:

Taxpayer filed its income and excess profits tax return for the calendar year 1942 on March 15, 1943, claiming the benefits of Section 722 of the Internal Revenue Code. (R. 100.) There was reported excess profits net income (without reference to Section 722) of \$1,884,586.83, and normal tax net income (computed without the credit provided in Section 26 (e) of the Internal Revenue Code of \$2,533,133.02. The excess profits net income was, it will be noted, more than 50% of the adjusted normal tax net income which entitled taxpayer, under Section 710 (a) (5) of the Internal Revenue Code, to defer 33% of the excess profits tax on the adjusted excess profits net income returned. (R. 100-101.)

The tax on the adjusted excess profits net income shown on the return was handled as follows (R. 100-101):

(1) The sum of \$1,410,924.79 in tax was paid at the time of the filing of the return.

(2) The sum of \$150,000 was satisfied by a credit to which taxpayer was entitled and is not here in issue.

(3) The balance, or \$135,203.36, was deferred under Section 710 (a) (5) of the Internal Revenue Code.

On August 29, 1944, the Commissioner of Internal Revenue determined that taxpayer was not entitled to relief under Section 722 of the Code and on September 30, 1944, advised taxpayer of a deficiency in excess profits taxes of \$135,203.36, with interest thereon from March 15, 1943. (R. 101.) The assessed deficiency and interest was paid on October 14, 1944 (R. 101), and a timely claim for refund was filed for the refund of the interest here in question (R. 102).

The District Court concluded that interest on the deficiency in excess profits taxes of \$135,203.36 did not start to run until the application for relief under Section 722 of the Code was denied and notice and demand was made by the Commissioner of Internal Revenue on the taxpayer. (R. 102-103.) Judgment was rendered for the taxpayer in the sum of \$11,640.98 representing the interest sought to be recovered on the deferred excess profits taxes from March 15, 1943, to September 30, 1944. (R. 103-106.)

STATEMENT OF POINT TO BE URGED

The District Court erred in concluding and hold-

ing that taxpayer was not liable for interest on deferred excess profits taxes from the date of deferment to the date the Commissioner determined that taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The validity of the Commissioner's determination that taxpayer is not entitled to relief under Section 722 of the Internal Revenue Code is not here at issue. The sole question is whether interest on the amount of excess profits tax deferred under Section 710 (a) (5) of the Internal Revenue Code was properly assessed and collected for the period from March 15, 1943, to the Commissioner's determination that taxpayer was not entitled to relief and notice thereon was given taxpayer. It is Collector's position that the court erred in granting judgment for taxpayer for the interest paid, on the ground that Section 292 (b) of the Internal Revenue Code, providing that no interest shall be assessed or collected on a deficiency determined by the Commissioner to be attributable to the final determination of an application for relief under Section 722 of the Code, was applicable only where the application for relief was granted, and on the further ground that even

if Section 292 (b) of the Code applies where the application for relief is denied, excess profits taxes deferred under Section 710 (a) (5) of the Code is specially excluded from the non-interest provisions of Section 292 (b) of the Code.

ARGUMENT

THE ASSESSED DEFERRED EXCESS PROFITS TAXES BORE INTEREST FROM THE DATE OF DEFERMENT

Section 722 (a) of the Internal Revenue Code (Appendix, *infra*) provides that—

In any case in which taxpayer establishes that the tax [excess profits taxes] computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purpose of an excess profits tax based upon comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *

The companion statute, Section 710 of the Internal Revenue Code (Appendix, *infra*), provides that where the adjusted excess profits net income com-

puted without reference to Section 722 of the Code for the taxable year of a taxpayer who claims the benefits of Section 722, is in excess of 50% of its normal tax net income for such year computed without the credit as provided in Section 26 (e) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 26), the taxpayer may defer 33% of the excess profits tax which taxpayer would otherwise be required to pay at the time of the filing of the return and the tax reduced shall, for the purposes of Section 271 of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 271), be considered the amount shown on the return. That section also provides that a deficiency in the amount deferred may be assessed at any time before the expiration of one year after the final determination of the Commissioner on taxpayer's application for relief.

Section 292 (b) of the Internal Revenue Code (Appendix, *infra*) provides that if any part of a deficiency for a taxable year beginning after December 31, 1941 (the taxable year here was 1942), is determined by the Commissioner to be attributable to the final determination of an application for relief under Section 722 of the Code, no interest shall be assessed or paid thereon for a period prior to one year after the filing of the application or September

16, 1945, whichever is the latter.¹ That section contains an exception to the non-interest provisions—

* * * (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710 (a) (5), and excluding, in case the taxpayer has availed itself of the benefits of section 710 (a) (5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of excess profits tax arising from the operation of section 722)
* * *

We believe that the District Court misinterpreted Section 292 (b) of the Code, for the reasons that (1) the section applied only where relief under Section 722 was granted and (2), if it were otherwise, excess profits taxes deferred under Section 710 (a) (5) are specifically excluded from the non-interest provisions of Section 292 (b). Relief under Section 722 would generally result (except as to the amount deferred) in a refund of excess profits taxes paid

¹ Correspondingly, Section 3771 (g) of the internal Revenue Code (26 U.S.C. 1946 ed., Sec. 3771) provides that if any part of an overpayment is determined by the Commissioner to be attributable to the final determination of an application for relief under Section 722 of the Internal Revenue Code (no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the latter.

and an increase in taxpayer's income taxes.² In such a case there would be no interest payable on the refund of excess profits taxes and no interest assessed on the income tax deficiency.

The very heading of Section 292 (b) stating "Deficiency Resulting from Relief Under Section 722" supports Collector's contention that Section 292 (b) is only applicable when an application for relief or benefit under Section 722 is granted. This contention is further supported by the discussion in Congress and the Committee Reports relating to H. R. 3363 which added Section 292 (b) to the Internal Revenue Code. Congressman Doughton, in introducing this bill in the House, stated (89 Cong. Record, Part 6, p. 8191):

The existing law requires that the Federal Government pay 6 percent interest on all refunds made to the taxpayer and that it collect 6 percent interest on all deficiencies paid to the Government; the interest to begin running from the date the overpayment was made in the case of a refund, and from the date the tax should have been paid in the case of a deficiency.

² A reduction of excess profits taxes would in turn increase the income taxes by decreasing the deduction of income subject to excess profits taxes as provided in Section 26 (e) of the Internal Revenue Code, as amended by Section 105 (d) of the Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U.S.C. 1946 ed., Sec. 26).

Since Section 722 of the Internal Revenue Code is for the relief of the taxpayer, and since it was made retroactive from the date of its enactment in October 1942 to the years 1940 and 1941, it is believed to be equitable to both the Government and the taxpayer not to pay interest on refunds, nor to collect interest on deficiencies for those 2 years when the refund or deficiency arises out of the application of Section 722. With respect to the year 1942, and subsequent years, it is also believed to be equitable for interest not to begin to run on refunds or deficiencies arising out of the application of this relief provision until September 16, 1945, or 1 year after an application for relief has been filed, whichever is later. The reason for this is because more than 25,000 applications have already been filed with the Commissioner of Internal Revenue, and a reasonable time should be given to the Commissioner to examine the complicated data filed in support of the claims before the Government is compelled to pay interest on any refunds which may be made or to collect interest on any deficiencies which may be assessed as a result of adjustments in other taxes following the granting of the relief under Section 722.

And, in the report from the Committee on Ways and Means accompanying the bill, it was stated (H. Rep. No. 722, 78th Cong., 1st Sess., p. 2):

The bill provides that no interest shall be allowed on overpayments attributable to determinations under Section 722 with respect to taxable years beginning in 1940 and 1941. Correspondingly, no interest will be collected on deficiencies resulting from such determinations for those years. Since Section 722 as amended by the Revenue Act of 1942 was made retroactive

to grant relief for taxable years beginning in 1940 and 1941, it is believed proper not to allow interest on overpayments or collect interest on deficiencies resulting from the application of this section to such years. With respect to 1942 and subsequent years, interest on overpayments and on deficiencies arising from the application of this section is not allowed for any period prior to September 16, 1945, or prior to 1 year after the filing of the application, whichever is the later.

As the claim for relief under the provisions of Section 722 involved here was rejected by the Commissioner, the determination of the deficiency in excess profits tax did not result from relief under Section 722, and Section 292 (b) is not applicable.

The court in *Jones v. Johnson*, 176 F. (2d) 693 (C.A. 10th), held that interest on an assessment of excess profits taxes made after the denial of an application for relief under Section 722 of the Code was properly assessed and collected. While it does not appear in the opinion, taxpayer in that case did not contest interest paid on the portion of the deficiency assessment representing the excess profits taxes deferred under Section 710 (a) (5) of the Code; the litigation concerned interest on the amount of the excess profits tax deficiency in excess of the deferred tax. However, it would be an anomalous situation if interest could not be collected on the portion of the deficiency deferred and at the same time

collected on the deficiency in excess of the amount deferred. The decision in the *Jones* case, *supra*, was, we think, based on the ground urged by the Government that Section 292 (b) of the Code applied only where the application for relief or benefit under Section 722 was granted.

Even if this Court should conclude that Section 292 (b) may apply where relief is denied, judgment in this case should be reversed for the reason that the section specifically excludes from non-payment of interest excess profits taxes deferred. The statute excludes "any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under Section 710 (a) (5)". The lower court interpreted that portion of the section to mean merely that the deferred tax (R. 90) "shall not be freed of interest until a date as late as September 16, 1945" and held (R. 93) "that interest was not chargeable until the deferred deficiency became payable", meaning upon denial of the application for relief and notice to the taxpayer. The lower court overlooked the fact that except for the provisions of Section 710 (a) (5) of the Code the entire excess profits tax would have been due March 15, 1943. Section 292 (b) in effect excludes from its provisions Section 710 (a) (5); consequently, from the standpoint of interest

the deferred tax was due March 15, 1943, and bore interest under Section 292 (a) of the Internal Revenue Code (Appendix, *infra*) from that date. The lower court's interpretation of the pertinent portion of Section 292 (b) renders that part of the section uncertain and virtually inoperative as well as discriminatory as against taxpayers who did not qualify for the deferment. Those taxpayers who paid the tax were deprived of the use of their money and, where the application was granted, received no interest thereon. The legislative history shows that Congress recognized that inequities would result unless interest was payable on the portion of the deficiency deferred. The report of the Committee on Finance in connection with the bill (H. R. 3363) adding Section 292 (b) to the Internal Revenue Code, stated (S. Rep. No. 508, 78th Cong., 1st Sess., p. 2):

The report set forth below of the Committee on Ways and Means of the House of Representatives states the purposes of the bill in extending the time for application under Section 722 of the Internal Revenue Code, and in making special provisions with respect to interest on overpayments and deficiencies attributable to determinations under that section. The committee amendment of Section 2 is designed to make appropriate provision for application of the section where there has been deferment of part of the excess-profits tax under Section 710 (a) (5) of the code. In general, a taxpayer must pay its tax, computed without any benefit, from the applica-

tion of Section 722. Since, under the bill, taxpayers which have paid their taxes in full, without the application of Section 722, will receive any refunds with interest only for the periods provided, taxpayers who have availed themselves of the deferment provided by Section 710 (a) (5) should be required to pay interest on the amount which they have underpaid.

We submit that the pertinent portion of Section 292 (b) of the Code requires that interest be collected on the deficiency of excess profits taxes deferred under Section 710 (a) (5). The meaning of the statute, read in the light of the committee report, above quoted, leaves no doubt as to what was intended. This case is precisely the situation Congress had in mind.

CONCLUSION

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

A. F. PRESCOTT,

JAMES P. GARLAND,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.
January, 1950.

APPENDIX

Internal Revenue Code:

SEC. 292 [as amended by Section 2, Act of December 17, 1943, c. 346, 57 Stat. 601]. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under Section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) *Deficiency Resulting From Relief Under Section 722.*—If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 for any taxable year

(excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under Section 710 (c) (5), and excluding, in case the taxpayer has availed itself of the benefits of Section 710 (a) (5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of excess profits tax arising from the operation of Section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.
[26 U.S.C. 1946 ed., Sec. 292.]

SEC. 710 [as added by Section 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) *Imposition.*—

* * * *

(5) [as added by Section 222 (b), Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Section 3 (a), Act of June 12, 1948, Public Law 635, 80th Cong., 2d Sess.] *Deferment of payment in case of abnormality.*—If the adjusted excess profits net income (computed without reference to Section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of Section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in Section 26 (e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the

purposes of Section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return. Notwithstanding any other provision of law or rule of law, to the extent that any amount of tax remaining unpaid pursuant to this paragraph is in excess of the reduction in tax finally determined under Section 722, such excess may be assessed at any time before the expiration of one year after such final determination.

* * * *

[26 U.S.C. 1946 ed., Sec. 710.]

SEC. 722 [as added by Section 201, Second Revenue Act of 1940, *supra*, and as amended by Section 222 (a), Revenue Act of 1942, *supra*]. GENERAL RELIEF — CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last

sentence of Section 722 (b) (4) and in Section 722 (c), regard shall be had to the change in the character of the business under Section 722 (b) (4) or the nature of the taxpayer and the character of its business under Section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

[26 U.S.C. 1946 ed., Sec. 722.]

No. 12,368

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant,

vs.

PUGET SOUND PULP & TIMBER CO.,

Appellee.

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

BRIEF FOR APPELLEE.

GEORGE H. KOSTER,

300 Montgomery Street, San Francisco 4, California,

ROBERT H. EVANS,

1111 Dexter Horton Building, Seattle, Washington,

Attorneys for Appellee.

Subject Index

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	3
Summary of argument	5
Argument	8
Introductory statement	8
The time prescribed for payment of the portion of the tax deferred under Section 710(a)(5) is the date of the Collector's notice and demand for payment of said tax	10
Interest on the deferred portion of the tax starts to run only from the date prescribed for payment of said tax, which is the date of the Collector's notice and de- mand	12
There is nothing in the legislative history of the statutory provisions herein discussed, or in the tax statutes, which is inconsistent or contradictory of the conclu- sions hereinabove expressed	12
That the date prescribed for payment of a tax can be a date other than the March 15 date for filing of a return has been recognized	19
Response to appellant's brief	22
Conclusion	31
Appendix	i-vi

Table of Authorities Cited

Cases	Pages
California Vegetable Concentrates, Inc. (1948), 10 T.C. 1158	27
Crossett Western Co. (1945), 9 T.C. 783	17, 18
Jones v. Johnson, 176 F. (2d) 693 (C.C.A. 10th)	27

Other Authorities

Current Tax Payment Act of 1943, Section 6(e)(1)	19, 21
Internal Revenue Code:	
Section 26(e)	4
Section 53	10
Section 56	10
Section 272, subdivisions (b) and (c)	11
Section 292(a)	7
Section 292(b)	7, 8, 11, 13, 14, 18, 21, 26
Section 710(a)(5)	2,
4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 25, 27, 28	
Section 718(b)(3)	17
Section 722	2, 3, 4, 8, 9, 13, 14, 15, 16, 27
Section 729	10
Section 3771(g)	13, 15, 26, 29, 30
Judicial Code, Section 24 (U.S.C. Title 28, Section 41(5) (now Title 28, United States Code, Section 1340))	1
28 U.S.C., Section 1291	2
T.D. 5300, Section 36.9, Cum. Bul. 1943, p. 43	20
Cum. Bul. 1948-2, p. 1	27
Public Law 201, Chapter 346, Act of December 17, 1943— 78th Congress, 1st Session	14

No. 12,368

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant,

vs.

PUGET SOUND PULP & TIMBER Co.,

Appellee.

Appeal from the United States District Court for the
Western District of Washington, Northern Division.

BRIEF FOR APPELLEE.

OPINIONS BELOW.

The opinion of the District Court (R. 83-96) is not
reported.

JURISDICTION.

This action arises under the Internal Revenue Laws
of the United States and was brought pursuant to
Section 24 of the Judicial Code, U.S.C. Title 28, Sec-
tion 41(5) (now Title 28, United States Code, Section

1340) for the recovery of interest of \$11,640.98 assessed against and collected from the plaintiff. (R. 2, 99.)

This interest of \$11,640.98 was interest for the period March 15, 1943 to August 29, 1944 computed at the rate of 6% per annum upon an assessment of excess profits taxes for the year 1942. (R. 99.) This interest was collected by the defendant from the plaintiff on November 30, 1944. (R. 99.) After paying the interest the plaintiff filed a claim for the refund of said interest (R. 102) and after the claim was rejected by the Commissioner of Internal Revenue, this suit was duly filed. (R. 102.)

The District Court entered judgment in favor of the plaintiff on July 11, 1949. (R. 105-106.) Defendant filed notice of appeal on August 19, 1949, pursuant to the provision of Title 28, United States Code, Section 1291.

QUESTION PRESENTED.

Where payment of a portion of the excess profits taxes disclosed by the taxpayer on its excess profits tax return for the year 1942 was deferred under the provisions of Section 710(a)(5) of the Internal Revenue Code because the taxpayer made a claim for relief under Section 722 of the Internal Revenue Code (and which claim the Court found was filed in good faith), and the Commissioner of Internal Revenue later proposed a rejection of the Section 722 relief claim

and assessed the deferred tax, and payment of said tax was thereupon demanded by and paid to, the Collector of Internal Revenue, was the taxpayer required to pay interest on the deferred tax for the period from March 15, 1943 (the due date for the filing of the 1942 tax return) to September 30, 1944, the date of the demand for the payment of the deferred tax?

STATUTES INVOLVED.

The pertinent statutes will be found in the Appendix, *infra*.

STATEMENT.

The facts were not in dispute—the pertinent facts were found (R. 99-102) as follows:

Plaintiff taxpayer (appellee in this proceeding) duly filed its income and excess profits tax return for the calendar year 1942 claiming the benefits of Section 722 of the Internal Revenue Code which section allowed relief through reduction of excess profits taxes if the requirements of that section could be satisfied. The claim for the benefits of Section 722 was a *bona fide* claim and was made in good faith. (R. 100, para. 7.)

The taxpayer reported on said return an adjusted excess profits net income (without reference to Section 722) of \$1,884,586.83, and a normal tax net income (computed without the credit provided in Section

26(e) of the Internal Revenue Code) of \$2,533,133.02. The reduction in excess profits tax which the taxpayer claimed should be allowed under Section 722 was \$409,707.16. (R. 100.) Under Section 710(a)(5) of the Internal Revenue Code, the taxpayer was entitled to defer the payment of excess profits taxes up to 33% of the amount of the claimed reduction, so pursuant to this statute, the taxpayer elected to and did defer the payment of \$135,203.36 (33% of \$409,707.16) of its excess profits taxes for the year 1942. (R. 100-101.) After reducing its excess profits tax by this deferred amount and by an allowable credit of \$150,000 not in issue, the taxpayer showed on its return an excess profits tax liability of \$1,410,924.79 which was duly paid. (R. 101.)

On August 29, 1944 the Commissioner of Internal Revenue determined that the taxpayer was not entitled to relief under Section 722 of the Internal Revenue Code, rejected the claim for relief under Section 722, and assessed against the taxpayer additional excess profits taxes for the year 1942 in the amount of \$179,199.48 which included the aforesaid \$135,203.36, payment of which had been deferred as aforesaid. (R. 101, para. 12.) On September 30, 1944, the defendant, the Collector of Internal Revenue, gave notice and demand upon the taxpayer for payment of this tax and interest thereon. (R. 101, para. 14.)

On October 14, 1944 the taxpayer paid to the defendant, the Collector of Internal Revenue, the said additional taxes and all interest thereon excepting the

interest in the sum of \$11,640.98 which was the interest up to August 29, 1944 on the deferred tax of \$135,203.36 and which interest was not paid to the Collector until November 30, 1944. (R. 101, para. 13; R. 99, para. 3.)

The District Court held with the taxpayer that interest on the amount of the deferred tax of \$135,203.36 did not start to run until the Commissioner rejected the claim for relief and the Collector made demand upon the taxpayer for the payment of said deferred tax, and therefore the interest collected in the amount of \$11,640.98 should be refunded. (R. 102-103.) Judgment in favor of the taxpayer was rendered accordingly. (R. 105.)

SUMMARY OF ARGUMENT.

The opinion of the Judge of the United States District Court, Honorable Lloyd L. Black, in this case, found in pages 83 to 96 of the Transcript of Record, in an excellent summary of the argument not only in support of the taxpayer's position but also in refutation of the appellant's arguments; and the Court's conclusions of law (R. 102-103) sustain the taxpayer's contentions.

The taxpayer's position (with reference to Internal Revenue Code sections) briefly stated is:

A. The time prescribed for payment of the portion of the tax deferred under Section 710(a)(5) is the date of the Collector's notice and demand for payment of said tax. (R. 102-103.)

1. The taxpayer was not liable for the deferred tax at the time the return was due. (Section 710(a)(5)).

2. The deferred tax was not payable at the time the return was due. Although the tax statute prescribes in effect that time for payment of the correct tax liability is the due date for filing the tax return and interest on any understatement of tax will be collected from the due date of the return because that is the date prescribed for payment of the correct tax, Section 710(a)(5) provides specifically that "the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33% of the amount of the reduction in the tax so claimed" under Section 722.

3. The taxpayer became liable for the deferred tax only after rejection of its Section 722 claim for relief, at which time the tax was assessable as a tax "deficiency". (Section 710(a)(5).)

4. A "deficiency" must be paid upon notice and demand from the Collector (Section 272(b) and (c)) and since Section 710(a)(5) specifically declares that the due date of the return is not the time "prescribed for payment" of this deferred tax, the only other time prescribed for payment of the tax is the time of the notice and demand from the Collector.

B. Interest on the deferred portion of the tax starts to run only from the date prescribed for pay-

ment of said tax, which is the date of the Collector's notice and demand. (R. 102-103.)

5. Interest on a tax deficiency is chargeable from the "date prescribed for the payment of the tax" to date of payment. (Section 292(a).)

6. Since the only date "prescribed for payment" of the deferred tax is the date of the collector's notice and demand for payment of the tax after the Commissioner of Internal Revenue has acted on the taxpayer's claim for relief, interest on such tax can start to run only from the date of the notice and demand.

The appellant's position as stated on page 5 of his brief, is "that the court erred in granting judgment for taxpayer for the interest paid, on the ground that Section 292(b) of the Internal Revenue Code, providing that no interest shall be assessed or collected on a deficiency determined by the Commissioner to be attributable to the final determination of an application for relief under Section 722 of the Code, was applicable only where the application for relief was granted, and on the further ground that even if Section 292(b) of the Code applies where the application for relief is denied, excess profits taxes deferred under Section 710(a)(5) of the Code is specially excluded from the non-interest provisions of Section 292(b) of the Code."

This contention of the Government that Section 292(b) applies makes a very complicated matter out

of what the taxpayer believes is not too complex. The taxpayer believes that Section 292(b) is not applicable to the issue involved in this case because of a specific exclusion within the section itself of taxes deferred under Section 710(a)(5), and argument will be presented herein answering all the arguments advanced by the appellant in his brief.

ARGUMENT.

INTRODUCTORY STATEMENT.

The appellee will first submit argument in support of its position as presented to and sustained by the Court below, and then will submit argument in refutation of the Government's arguments advanced in appellant's brief filed in this proceeding.

The excess profits tax was imposed at the rate of ninety per cent upon all net income in excess of the credit allowed by law. Congress realized that such a tax would be discriminatory against certain corporate taxpayers which had inadequate credit. For the purpose of avoiding or at least mitigating such discrimination Congress made provision for a constructive credit for those corporations which came within the provisions of Section 722 of the Internal Revenue Code. Since the relief under Section 722 was available only after payment of the tax and upon application for refund, it was considered that in order to make the relief of practical benefit a provision should be made for the deferment of a portion of the excess

profits tax under certain circumstances when more than fifty per cent of the corporation's income was subject to excess profits tax. In such connection such Section 710(a)(5) of the Internal Revenue Code was enacted. Such section gave to the corporation within its terms the right of deferring an amount equal to thirty-three per cent of the reduction claimed.

Appellee taxpayer in connection with the 1942 tax was within the provisions of Section 710(a)(5) and elected to reduce the amount of excess profits tax otherwise payable by it by thirty-three per cent. The amount of this reduction was \$135,203.36. The Court found as a matter of fact that the taxpayer's claim for relief under Section 722 was a bona fide claim and was made in good faith and taxpayer believed and under the evidence had the right in all honesty to believe that it was entitled to the relief it claimed. (R. 86.)

On August 29, 1944 the Commissioner of Internal Revenue rejected the taxpayer's claim for relief under Section 722¹ and on September 30, 1944, the Collector of Internal Revenue made demand upon the taxpayer for payment of the deferred tax with interest at 6% per annum from March 15, 1943, the due date for the filing of the 1942 tax return. The propositions upon which the taxpayer relies in support of its contention that the said interest was erroneously and illegally assessed and collected and should be refunded, are stated in the foregoing summary of argument.

¹Taxpayer has filed an appeal from this action to the Tax Court of the United States, and the case is awaiting trial. (R. 37-38.)

No decision, other than the decision of the Court below in this case, has been found in which the issue involved in this proceeding has been considered or decided.

THE TIME PRESCRIBED FOR PAYMENT OF THE PORTION OF THE TAX DEFERRED UNDER SECTION 710(a)(5) IS THE DATE OF THE COLLECTOR'S NOTICE AND DEMAND FOR PAYMENT OF SAID TAX.

The excess profits tax for the year 1942 was imposed by Section 710(a) of the Internal Revenue Code. The sections of the Code which pertain to the excess profits tax do not specifically provide for the filing of returns or for the payment of the tax but incorporate by reference the general provisions pertaining to income taxes. (See Internal Revenue Code, Section 729.) Under the provisions of Sections 53 and 56 of the Internal Revenue Code the excess profits tax return was required to be filed on March 15, of the year following the taxable year and the excess profits tax was payable on March 15 or in quarterly installments on March 15, June 15, September 15 and December 15 of the year succeeding the taxable year. Thus in the case of corporations which made their returns on the basis of the calendar year, as did appellee, March 15, 1943 was the date prescribed for the payment of the excess profits tax for 1942 except that taxpayers had the privilege of paying the tax in quarterly installments as mentioned above. (Code sections referred to herein are set out in the appendix hereto.)

While March 15, 1943 was the date "prescribed for payment" of taxpayer's excess profits tax for 1942, it was not the date prescribed for payment of the portion of the tax (\$135,203.36) which the taxpayer was permitted to defer under the provisions of Section 710(a)(5) of the Internal Revenue Code for said section specifically provided "the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the reduction in the tax so claimed". Section 710(a)(5) did not specify a date for the payment of the portion of the tax deferred thereunder in the event of a determination that such deferred portion was payable. Said section did provide, however, that "For the purposes of Section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return" and said quoted provision when considered together with Section 271 which defines "deficiency" as "* * * the amount by which the tax imposed by this chapter exceeds * * * the amount shown as the tax by the taxpayer upon his return * * *" had the effect of including such deferred portion of the excess profits tax within the definition of "deficiency". The only provision for the payment of a deficiency is contained in Section 272 which provides that a deficiency "shall be paid upon notice and demand from the Collector". (See Section 272, subdivisions (b) and (c).)

On the basis of the foregoing analysis of the law it is respectfully submitted that the time prescribed for payment of the portion of the tax deferred under the

provisions of Section 710(a)(5) is the date of notice and demand by the Collector, and the Court below was correct in so deciding.

INTEREST ON THE DEFERRED PORTION OF THE TAX STARTS TO RUN ONLY FROM THE DATE PRESCRIBED FOR PAYMENT OF SAID TAX, WHICH IS THE DATE OF THE COLLECTOR'S NOTICE AND DEMAND.

As the portion of the excess profits tax deferred under the provisions of Section 710(a)(5) was by that section specifically brought within the classification of a deficiency in the event said deferred portion was later determined to be payable, it is necessary to examine the provision with regard to interest on deficiencies to determine the interest payable upon the deferred excess profits tax. Section 292 of the Internal Revenue Code makes provision for interest on deficiencies and provides "Interest upon the amount determined as a deficiency * * * shall be collected as a part of the tax, at the rate of 6 per centum per annum *from the date prescribed for payment of the tax* (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, * * *"
(Italics supplied.)

It is clear from the foregoing quotation that interest is payable on a deficiency only *from the date prescribed for payment of the tax*. It is also clear from the provisions of Section 710(a)(5) that the regular time prescribed for payment of the excess profits tax is not applicable to the portion of the tax deferred under

Section 710(a)(5) and that the only time prescribed for the payment of such deferred portion of the tax is the date of the notice and demand by the Collector.

It must necessarily follow, therefore, that interest is chargeable upon the deferred tax only from the date of the Collector's notice and demand for payment of said tax, and the Court below is correct in so deciding.

THERE IS NOTHING IN THE LEGISLATIVE HISTORY OF THE STATUTORY PROVISIONS HEREIN DISCUSSED, OR IN THE TAX STATUTES, WHICH IS INCONSISTENT OR CONTRADICTORY OF THE CONCLUSIONS HEREINABOVE EXPRESSED.

Generally speaking the mechanics of tax computation results in this situation—where the income subject to excess profits tax is reduced (as for example because of an increase in the excess profits tax credit through the application of Section 722), thus reducing the excess profits tax, the income subject to income tax, and the income tax, is increased because the income subject to income tax is the net income *less* the income subject to excess profits tax. Since the law provided that no interest is to be paid on refunds as the result of Section 722 (Section 3771(g) of the Internal Revenue Code), it would seem fair that a corollary provision should be set forth in the statute to exempt the resultant income tax deficiency from a charge for interest. Such a corollary provision is contained in Section 292(b) of the Internal Revenue Code.

Section 292(b) provides that “if any part of a deficiency for a taxable year beginning after December

31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under Section 722 * * * no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later", and then, by a parenthetical provision, the section is declared to be non-applicable to a deficiency constituting a deficiency by reason of deferment of tax under Section 710(a)(5). However, the Senate Finance Committee Report on Section 2 of H. R. 3363 (also cited by appellant in his brief) which added subsection (b) to Section 292 of the Internal Revenue Code (Public Law 201, Chapter 346, Act of December 17, 1943—78th Congress, 1st Session) contains the following statement:

"In general, a taxpayer must pay its tax, computed without any benefit from the application of Section 722. Since, under the bill, taxpayers which have paid their taxes in full, without the application of Section 722, will receive any refunds with interest only for the periods provided, taxpayers who have availed themselves of the deferment provided by Section 710(a)(5) should be required to pay interest on the amount by which they have underpaid."

It is difficult to understand this statement; first, because it compares the status of taxpayers who will receive refunds under Section 722 with taxpayers whose claims for refund under Section 722 are rejected; second, because Section 292(b) specifically excludes from its applicability the matter of interest on

deficiencies by reason of deferment under Section 710(a)(5); and third, because it contains no direct statement about how the interest on such deficiencies should be computed either as to the specific date from which interest should be charged or the date that the deferred portion of the tax becomes payable. At first reading the statement appears to indicate that the interest should be charged from the due date of the return, but since that is not specifically stated in the report, and is certainly not so stated in the statute, there is real doubt as to whether that was intended. The doubt is even further emphasized when it is considered that the statute actually condones a possible discrimination in cases where claims under Section 722 are allowed. In other words, a person who defers his tax under Section 710(a)(5) and later has his claim for relief under Section 722 allowed in full, has had the use of the deferred money at all times; whereas the person who did not defer any tax under Section 710(a)(5) and who later has his claim for relief under Section 722 allowed in full, is given a refund because he paid the tax when he filed his return instead of deferring it, *but the refund is without interest* so that that person has been deprived of the use of money without compensation from the time he paid it upon the filing of his return to the time it was refunded to him (Section 3771(g) Internal Revenue Code). This certainly indicates that Congress did not consider this possible discrimination between persons who did defer and persons who did not defer in so far as the payment of interest on refunds is concerned, as objection-

able. Since Congress did not see fit to distinguish between persons who deferred payment under Section 710(a)(5) and persons who did not in regard to payment of interest *to them* where a claim for relief under Section 722 was allowed, it would seem likely that Congress did not intend to create any distinction between those persons in regard to payment of interest *by them* where a claim for relief under Section 722 was rejected. It must be kept in mind that all taxpayers who qualified were given the right to defer a part of the tax under Section 710(a)(5) so that all taxpayers had the opportunity at least of being on an equal plane.

In view of the uncertainty as to just what the Senate intended to convey by the statement above quoted, the decision of the question here involved must depend exclusively upon the statute as it is written. Section 292(b) is clear in excluding from its application interest on taxes deferred under Section 710(a)(5). Section 292(b) is clear in that it is absolutely silent as to whether or not interest is collectible on a deficiency by reason of deferment of tax under Section 710(a)(5). Other statutory provisions are clear as hereinbefore established, *supra* pp. 11-12 to the effect that the deferred tax is not payable until the date of notice and demand by the Collector for payment of the tax and that interest thereon does not start to run until that date. It is also clear that there is no other date prescribed in the statute for the payment of a tax deferred under Section 710(a)(5). The confusion is

caused not by the statute but by the Congressional reports.

No better case than this could be found for the application of the well established doctrine that Congressional reports may be resorted to to determine the meaning of a statute only when the statute is ambiguous in its wording or meaning. In the case of *Crossett Western Co.* (1945), 9 T. C. 783, which involved the interpretation of Section 718(b)(3) of the Internal Revenue Code, the Government presented the same argument as to proper statutory construction as is presented by appellee here. The Tax Court, in stating the Government's contention said, "The respondent contends that resort may not be had to the Committee reports for construction of the statute; that, standing by itself, the statute is clear and unambiguous; and that if any ambiguity exists it is caused by reference to the reports." The Tax Court sustained the Commissioner's position concluding that,

"While resort may be had in some circumstances to the legislative history to find the Congressional intent, when Congress has spoken in clear and unambiguous language the normal and reasonable meaning of an act is not to be argued to one side in favor of a construction made possible only by the distortion or disregard of such plain language."

The *Crossett* case was appealed to the Court of Appeals for the Third Circuit who affirmed the Tax Court (1946—155 F.(2d) 433), concluding, after reviewing the legislative history of the Act, "we agree with the

Tax Court that the clear language of the statute specifically governs the situation before us.”

In this case the Government is doing the very thing it criticized in the *Crossett* case in referring to an ambiguous Congressional report and giving it a meaning not apparent from its text to justify an interpretation of a statute contrary to the unambiguous wording of the statute. There is absolutely no justification for such a practice in the rules for statutory construction.

The Court below after carefully considering the legislative history of Section 292(b) concluded:

“Therefore if the law had been left as the House Committee recommended it, the defendant not only would not have been able to have collected interest from March 15, 1943, but would not have been able to have collected interest from the plaintiff until a period beginning September 16, 1945. But if the provision of the law as it is is clear, equitable and consistent as to 1940 and 1941, it is difficult for me to comprehend how it would be unfair not to begin interest on the 1942 taxes as of March 15, 1943. The Senate Committee report does not say that the interest is to be chargeable from March 15, 1943. It merely says that by the amendment interest will be chargeable on the deficiency. Since it says no more, clearly, that interest will begin when it should begin according to law.

Plaintiff says that according to the clear statement of the law the interest does not begin until it is payable. The Senate Committee report does not disagree with that contention. The House Committee report in no wise disagrees with that

contention. I am satisfied that the law is as plaintiff contends, that interest was not chargeable until the deferred deficiency became payable. Under the law the deferred deficiency became payable in September, 1944, when the Commissioner demanded payment." (R. 92-93.)

THAT THE DATE PRESCRIBED FOR PAYMENT OF A TAX CAN BE A DATE OTHER THAN THE MARCH 15 DATE FOR FILING OF A RETURN HAS BEEN RECOGNIZED.

This question of whether the date prescribed for payment of a tax can be anything other than the March 15th date for filing of a return has already been considered in a somewhat analogous situation. Under Section 6(e)(1) of the Current Tax Payment Act of 1943 the taxpayer was given the right to elect (as Section 710(a)(5) does) to secure the benefits of a twelve-month extension for payment of one-half of the 25% increase in the 1943 tax in connection with the partial forgiveness of 1942 tax liabilities. The section provided further:

"If such amount is not paid on or before the date on which it is payable, there shall be collected, as a part of the tax interest on such amount at the rate of 6% per annum for the period beginning with the date on which such amount is payable and ending with the date on which it is paid."

The Commissioner's regulations with respect to this statutory provisions read as follows:

“If the taxpayer elects in accordance with the conditions prescribed to extend the time for the payment of such portion of the tax for the taxable year 1943, *interest on the amount with respect to which the extension applies is not payable for the period of the extension.* If, however, such amount is paid after the termination of such period, there shall be collected as part of the tax interest at the rate of 6 per cent per annum for the period *beginning with the date on which such amount is payable* under the extension and ending with the date upon which it is paid.” (Italics ours.) (TD 5300, Sec. 36.9, Cum. Bul. 1943 p. 43.)

There is no question but that the persons who elected to take advantage of the extension had an advantage over those who did not elect to do so in that they had the use of their money over the period of extension, and it might well have been argued that interest should have been charged from the due date of the return in order to equalize the situation between those taxpayers who elected to take advantage of the extension and those who did not, but no effort was made to avoid this possible discrimination. We respectfully submit that inasmuch as all taxpayers were extended the same election under Section 710(a)(5) there was no need to consider whether those who did elect had an advantage over those who did not elect or *vice versa*, and there is no more reason for being concerned about the possible advantages or disadvantages between persons who did elect under Section 710(a)(5) and those who did not, than for being concerned about the possible advantages or disadvantages

between persons who did elect to take the extension granted under Section 6(e)(1) of the Current Tax Payment Act of 1943, and those who did not. Congress was not concerned by those possible differences in the latter situation so it can well be assumed that Congress was not concerned by those possible differences in the former situation, and the statute was written accordingly.

When Section 292(b) was under consideration, Congress could very easily have provided that deficiencies resulting from deferment of tax under Section 710(a)(5) shall bear interest from the due date of the return had Congress so intended. Since the Congress did nothing about the matter it must be assumed that Congress was satisfied that the proper answer would be obtained through the application of the general statutory provisions relating to deficiencies and the assessment of interest thereon. As hereinbefore established, under these general statutory provisions (Section 272(b) and (c), and Section 292(a) Internal Revenue Code) interest did not begin to run on the \$135,203.36 deferred by plaintiff under Section 710(a)(5) until the date prescribed for the payment thereof and the only date prescribed for the payment thereof was the date of notice and demand from the Collector. This was the decision of the Court below. The decision is correct and should be sustained.

RESPONSE TO APPELLANT'S BRIEF.

The appellee is in a quandary as to just what the Government's argument really is in this appeal from the District Court's decision. On page 8 of his brief, appellant states, "We believe that the District Court misinterpreted Section 292(b) of the Code, for the reasons that (1) the Section applied only where relief under Section 722 was granted and (2), if it were otherwise, excess profits taxes deferred under Section 710(a)(5) are specifically excluded from the non-interest provisions of Section 292(b)", and on page 11 of his brief he concludes, "As the claim for relief under the provisions of Section 722 involved here was rejected by the Commissioner the determination of the deficiency in excess profits tax did not result from relief under Section 722, and Section 292(b) is not applicable." These quotations give the impression that the District Court based its decision on Section 292(b), but the Court did not base its decision on that Section. In fact the Court first concluded that Section 292(b) did not contain the answer to the questions presented, before it decided the case in favor of the taxpayer.

In the Court below, the taxpayer argued as hereinbefore argued, that the answer to the issue involved in this case must be found, not in Section 292(b), but in the statutes which deal generally with the matter of when taxes become payable and the period from which interest on taxes is to be charged. The Court below, in disposing of Section 292(b) which it considered very carefully because of the Government's contention before that Court that Section 292(b) and its

legislative history supported the assessment of the interest collected on the deferred payment, concluded —“It merely says that a deficiency portion of a deferment under Section 710(a)(5) shall not be freed of interest until a date as late as September 16, 1945. It says no more.” (R. 90.) The Court below also stated, “Plaintiff says that according to the clear statement of the law the interest does not begin until it is payable. The Senate Committee report does not disagree with that contention. The House Committee report in no wise disagrees with that contention. I am satisfied that the law is as plaintiff contends, that interest was not chargeable until the deferred deficiency became payable. Under the law the deferred deficiency became payable in September, 1944, when the Commissioner demanded payment.” (R. 93.) And again, the Court below in sustaining plaintiff’s position stated, “The contention of the plaintiff is easily followed, that the statute provides that the interest starts when the amount becomes payable. The amount became payable on September 30, 1944. My decision must be to that effect. So construing the clear language of the statute, the legislative history is likewise consistent and logical. * * * Neither the Act nor the legislative history calls for interest for any period before the deferred amount became payable.”

It is the taxpayer’s understanding of the decision of the Court below that the Court held that the general statute relating to liability for, and payment of the deferred tax, and to the imposition of interest on such tax, did not require that interest be charged for any

period prior to the date of notice and demand from the Collector, and that there is nothing in Section 292(b) which changes the effect of these general statutory provisions. The Government in arguing that Section 292(b) does not apply offers no answer to the Court's decision that under the general statutory provisions no interest is collectible until the date the deferred tax becomes payable.

The first eleven pages of the Government's brief leave the impression that the Government's position depended upon showing that Section 292(b) did not apply to this case, which, as just stated above, is difficult to understand in view of the fact that the Court below did not base its decision upon Section 292(b). On page 12 of the Government's brief, however, it is stated,—“Even if this Court should conclude that Section 292(b) may apply where relief is denied, judgment in this case should be reversed for the reason that the section specifically excludes from nonpayment of interest excess profits taxes deferred,” and the Government concludes on page 14 of its brief, “We submit that the pertinent portion of Section 292(b) of the Code requires that interest be collected on the deficiency of excess profits taxes deferred under Section 710(a)(5).” There is nothing in the Government's brief which supports the conclusion that Section 292(b) of the Code requires that interest be collected on the deferred tax from the filing date of the return. The Court below gave about as thorough an analysis of Section 292(b) as can be submitted, before reaching the inevitable conclusion that, “It merely says that a

deficiency portion of a deferment under Section 710(a)(5) shall not be freed of interest until a date as late as September 16, 1945. It says no more." (R. 90.)

The taxpayer might well conclude this refutation of the Government's argument by the bare statement that the Government has submitted nothing to establish the proposition that interest should be collected from the filing date of the return on which the deferment was claimed. However, on page 13 of its brief the Government emphasizes a contention that unless its position is upheld serious inequities will result. Since this argument directed to equitable and practical considerations is absolutely without merit, it must be given some attention to point out wherein it can be of no consequence in this case. The very example given by the Government on page 13 of its brief practically answers the argument all by itself. The Government states presumably as an example of inequity, "Those taxpayers who paid the tax were deprived of the use of their money and, where the application was granted, received no interest thereon." The Government's statement just quoted might be better understood when reduced to a hypothetical example:

"Assume two taxpayers in an identical situation, each filing in March 1943 a claim for relief under Section 722, one of the taxpayers deferring \$30,000 of tax under Sec. 710(a)(5) and the other making no deferment but paying the full tax upon filing of the return. Assume both claims are allowed in June 1945 to the extent of \$30,000.

The first taxpayer's right to the \$30,000 which it had deferred becomes absolute; the second taxpayer is entitled to a refund of \$30,000. There can be no dispute that where the refund is made to the second taxpayer, *the taxpayer will not be paid interest on the overpayment.*" (Sec. 3771(g) Internal Revenue Code.)

This example is a correct statement of the effect of the law as Congress enacted it. It is obvious that from the point of view of logic there is a discrimination in this situation as has already been mentioned in this brief, Supra, pp. 13-19, in that the first taxpayer has been able to utilize the \$30,000, payment of which he deferred, from March 1943 until June 1945, whereas the second taxpayer has been deprived of any earning on such a sum for that period since it has paid it over to the Government in 1943. *And yet Congress apparently did not believe that this situation reflected a discrimination which justified any special relief or the payment of interest to the second taxpayer.* If the Government, by citing this example, is intending to suggest that interest should be collected under Section 292(b) on the deferred payment even where the relief claim has been allowed and therefore no liability for the deferred tax has ever arisen, in order to correct this "inequity" when compared with the taxpayer who paid his tax instead of deferring it, the Government's argument is irrational in attempting to charge interest on something for which the taxpayer was never liable, especially when it is kept in mind that every taxpayer in the class entitled to defer a

tax, had the right of election to claim the deferment. As hereinbefore pointed out, this is not the first time that Congress refused to recognize advantages or disadvantages with respect to interest charges in particular situations as being discriminatory. (Supra, p. 19.) Since Congress did not consider this advantage or disadvantage with respect to interest as being discriminatory, any argument made by the Government based on the premise that this situation is discriminatory must necessarily fail.

The appellant cites the case of *Jones v. Johnson*, 176 F. (2d) 693 (C.C.A. 10th) which, so far as appears from the record, holds that the filing or rejection of a Section 722 claim does not relieve the taxpayer from liability for interest on an ordinary tax deficiency resulting from adjustments which had nothing to do with Section 722, or the claim for relief filed under that Section. The case neither involved nor considered the matter of interest on taxes deferred under Section 710(a)(5), and has no applicability to this case.

The case of *California Vegetable Concentrates, Inc.* (1948), 10 T.C. 1158 (to which the Commissioner of Internal Revenue expressed acquiescence in Cum. Bul. 1948-2, p. 1), which though not involving the interest question involved in this case, did involve a question which made it necessary to go into a comprehensive analysis of the status of the tax deferred under Section 710(a)(5), and in that analysis the Tax Court reached conclusions which are in harmony

with the contentions advanced by the taxpayer in this case. The following is a brief analysis of that case:

In that case the petitioner filed with its excess profits tax return a claim for relief under Section 722 and under Section 710(a)(5) reduced the amount payable by 33% of the amount of the claim. The Commissioner audited the return and included in the total tax and the proposed tax deficiency, the amount deferred under Section 710(a)(5). No final action had yet been taken on the claims for relief. The taxpayer contended that the amount deferred under Section 710(a)(5) should not be considered part of the total tax and should not be treated as a deficiency until after the claims for relief had been considered and acted upon by the Commissioner. The Tax Court sustained the taxpayer pointing out:

“The deficiencies determined by the Respondent, however, do not reflect the reduction in ‘tax payable at the time prescribed for payment’, that is, they defer no part of the adjusted excess profits tax liability. * * *”

“It is obvious, therefore, that if this Court approves the respondent’s view and does not exclude the 33 per cent of the amount claimed under Section 722, from the deficiency here being redetermined, the Commissioner may assess it and is, therefore, able to demand payment—and the taxpayer will have secured only temporarily the immunity from assessment, that is, deferment of the 33 per cent granted deferment under Section 710(a)(5) * * *.”

“Section 710(a)(5), it seems to us, clearly provides deferment until the completion of the determination of the claim under Section 722, for the deferment is provided only under certain circumstances for one who files a claim under Section 722, and it seems apparent that the object in view was to recognize that such a taxpayer filing a claim for relief under Section 722, and the adjusted excess profits net income of which was more than 50 per cent of its normal tax net income, should be considered sufficiently likely to prevail at least to some extent on its claim that it would be only fair to let such taxpayer retain 33 per cent of the amount of such claim, until final adjustment thereof. To permit the deferment only until the Commissioner could issue a deficiency notice (prior to Section 722 procedure) and collect thereon is not in line with the obvious intent of the statute * * *.”

The Tax Court stated that final action on the Section 722 claim

“is clearly a determination of the amount of tax liability of the taxpayer, for it either allows, or, in whole or in part, disallows the relief asked for under Section 722 and, so far as the deferred 33 per cent is concerned, determines that there is, or is not, tax liability therefor. In our view, such is the *first* determination of the taxpayer's liability for 33 per cent * * *.”

“Section 722(d) provides, in connection with relief under Section 722, that the taxpayer shall compute its tax, file its return and pay the tax shown thereon, without application of Section

722, 'except as provided in Section 710(a)(5)'. From all of the above we conclude that Congress did not intend that the taxpayer should be liable for the 33 per cent until completion of Section 722 procedure and as a part of the deficiency, if any, then determined''.

It is respectfully submitted that the above case supports the taxpayer's position in this case that

(1) The taxpayer was not liable for the deferred tax at the time the return was due.

(2) The deferred tax was not payable at the time the return was due.

(3) The taxpayer became liable for the deferred tax only when the Commissioner took action on the Section 722 claim.

(4) The time "prescribed for payment" of the deferred tax is the time the Commissioner acts on the Section 722 claim, or the date of the Collector's Notice and Demand for payment issued pursuant to such action.

We respectfully submit that appellant has not shown wherein the Court below erred either in the decision or in the conclusions of law on which the decision was based. The decision of the Court below is correct and should be sustained.

CONCLUSION.

The Court below, after concluding that the deferred tax became payable upon notice and demand from the Collector, and that interest started to run only after the tax became payable, summed up the case very nicely in these words:

“* * * I may say that if Congress had intended that deferment intended to be an aid to the taxpayer was to bear interest not from the time the deferment became payable but from the time the tax would have been payable if there had been no deferment, Congress could have so provided. This Court cannot supply that lacking legislation.” (R. 94.)

It is respectfully submitted that the Judgment of the Court below should be affirmed.

Dated, San Francisco, California,
January 27, 1950.

Respectfully submitted,

GEORGE H. KOSTER,

ROBERT H. EVANS,

Attorneys for Appellee.

(Appendix Follows.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

Appendix.

Appendix

SEC. 729. LAWS APPLICABLE

(a) GENERAL RULE. All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

SEC. 53. TIME AND PLACE FOR FILING RETURNS

(a) TIME FOR FILING—

(1) GENERAL RULE. Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

SEC. 56. PAYMENT OF TAX

(a) TIME OF PAYMENT. The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) INSTALLMENT PAYMENTS. Except in the case of an individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made ap-

plicable), the taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

SEC. 710(a)(5). DEFERMENT OF PAYMENT IN CASE OF ABNORMALITY

If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income) the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

SEC. 271(a) DEFINITION OF DEFICIENCY

IN GENERAL. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means

the amount by which the tax imposed by this chapter exceeds the excess of—

- (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over * * *
- (2) the amount of rebates, as defined in subsection (b)(2), made.

SEC. 271(b) RULES FOR APPLICATION OF SUBSECTION (a)

For the purposes of this section—

- (1) The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143(a);
- (2) The term “rebate” means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

- (3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

SEC. 272. PROCEDURE IN GENERAL

(b) **COLLECTION OF DEFICIENCY FOUND BY BOARD.** If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) **FAILURE TO FILE PETITION.** If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

SEC. 292. INTEREST ON DEFICIENCIES

(a) **GENERAL RULE.** Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected

as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) **DEFICIENCY RESULTING FROM RELIEF UNDER SECTION 722.** If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710(a)(5), and excluding, in case the taxpayer has availed itself of the benefits of section 710(a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of

excess profits tax arising from the operation of section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

SEC. 3771. INTEREST ON OVERPAYMENTS

(g) CLAIMS BASED UPON RELIEF UNDER SECTION 722. If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

No. 12,368

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant,

vs.

PUGET SOUND PULP & TIMBER Co.,

Appellee.

**Appeal from the United States District Court for the
Western District of Washington, Northern Division.**

APPELLEE'S PETITION FOR A REHEARING.

GEORGE H. KOSTER,

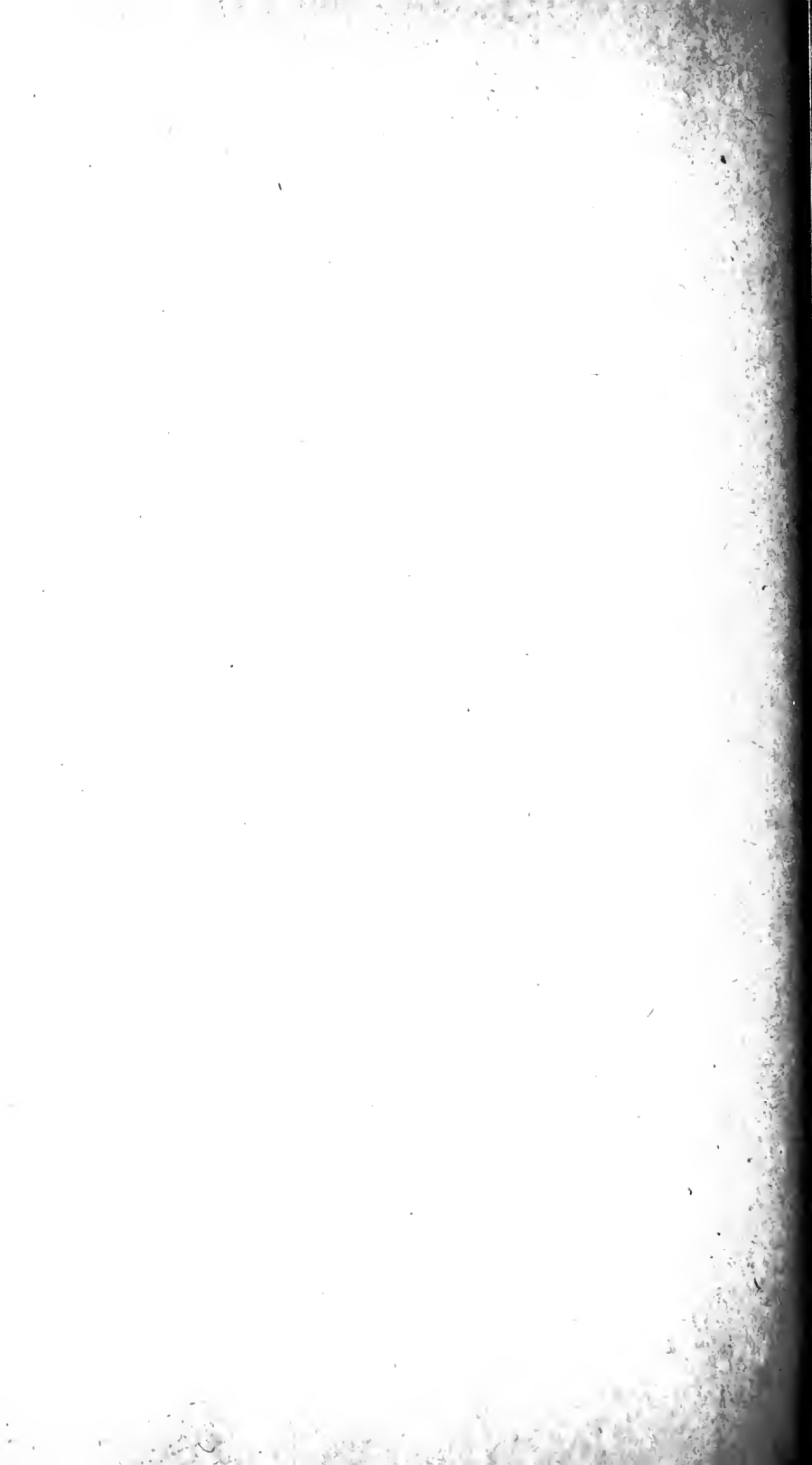
300 Montgomery Street, San Francisco 4, California,

*Counsel for Appellee
and Petitioner.*

FILED

MAY 15 1950

PAUL P. O'BRIEN,
CLERK



Subject Index

	Page
Statement in support of foregoing grounds.....	3
Introduction	3
Grounds I and II	4
Grounds III and IV	10
Statutes	16
Conclusion	17

Table of Authorities Cited

Cases

	Pages
Busser v. U. S. (C.C.A. 3, 1942), 130 F. (2d) 537.....	12
California Vegetable Concentrates, Inc. (1948), 10 T. C. 1158	7
Gould v. Gould (1918), 38 S. Ct. 53, 245 U. S. 151.....	16
Manning v. Seeley Tube & Box Co., 70 S. Ct. 386....	2, 3, 4, 14, 15
U. S. v. Updike (1930), 281 U. S. 489, 50 S. Ct. 367.....	16

Statutes

Internal Revenue Code:

Section 292(a)	2, 9, 11
Section 292(b)	9, 12, 13
Section 710(a) (5)	2, 7, 8, 9, 10, 11, 12, 15, 16
Section 722	2, 3, 14
Section 3771(e)	7
Section 3771(g)	14

Revenue Act of 1942:

Section 213	10
Section 222(b)	11
Section 722(e)	11

Other Authorities

Report No. 2333, page 148, 77th Congress, 2d Session, relating to H.R. 7378	10
---	----

No. 12,368

IN THE
United States Court of Appeals
For the Ninth Circuit

CLARK SQUIRE, United States Collector
of Internal Revenue for the State of
Washington,

Appellant,

vs.

PUGET SOUND PULP & TIMBER CO.,

Appellee.

Appeal from the United States District Court for the
Western District of Washington, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Comes now the Puget Sound Pulp & Timber Co.,
by its attorney, the appellee in the above entitled pro-
ceeding in which judgment was rendered by this Court
on April 28, 1950, reversing the judgment of the Dis-
trict Court, and presents its petition for rehearing of
the above entitled cause, and in support thereof re-
spectfully shows:

I.

That the conclusion of this Honorable Court that the "date prescribed for payment of the tax", as that term is used in Section 292(a) of the Internal Revenue Code, refers to the date generally prescribed for the payment of taxes, and not to the date prescribed for the payment of taxes the payment of which was deferred under Section 710(a)(5) of the Internal Revenue Code, and which is the subject of the deficiency on which the interest was charged, is not in accord with the meaning of those statutes as appellee believes they were construed by the United States Supreme Court in its decision in the recent case of *Manning v. Seeley Tube & Box Co.*, 70 S. Ct. 386, decided February 6, 1950 after the briefs in this case had been filed, and is therefore in error.

II.

That the conclusion of this Honorable Court that, "The underlying purpose of these sections" (Sections 292(a), 722 and 710(a)(5)) "reflects a legislative intent to treat a deferred amount, which is later determined to be owing, just as if it had been owing from the date the tax became due," is in conflict with the specific provisions of Section 710(a)(5) that the deferred tax is not payable at the time the balance of the tax was payable, and in conflict with the inference in the Supreme Court's decision in the *Seeley Tube & Box Co.* case, *supra*, that if a tax is deferred, interest does not start to run until it becomes due and payable at some time later than the due date of the tax return, and therefore the Court's conclusion is in error.

III.

That the Court's basis for construing the legislative intent with respect to the assessment of interest on a deferred tax is not consistent with the discussion contained in the Supreme Court's decision in the *Seeley Tube & Box Co.* case, *supra*, and though seemingly leading to a practical reasonable result in this instance, will lead to an injustice in other instances, possibly in this very case if this taxpayer should be successful in the further prosecution of its claims for relief under Section 722, and is therefore in error.

IV.

That the Court's conclusion is based upon an interpretation of the statutes which appellee believes is in conflict with the express and unambiguous provisions of the statute, and in conflict with the well established rule of statutory construction that Internal Revenue statutes should not be extended beyond the clear import of the language used and in case of doubt are to be construed most strongly against the Government, and in favor of the citizen, and the Court's conclusion is therefore in error.

STATEMENT IN SUPPORT OF FOREGOING GROUNDS.**INTRODUCTION.**

The *Seeley Tube & Box Co.* decision was rendered February 6, 1950, after the briefs were filed in this proceeding so no reference to that decision is contained in the briefs. The Government made no men-

tion of the case in its argument before the Court, and appellee, in its reliance upon what it thought was clearly contained in the applicable statutory provisions, did not consider the said decision as applicable to this case. However, in view of this Court's analysis and interpretation of those statutes leading to conclusions not advanced by the Government and therefore not heretofore discussed by appellee, and which conclusions appellee believes to be contrary to expressions contained in said Supreme Court decision, appellee files this petition to call this decision to the attention of the Court and to point out wherein it is believed the Court's conclusions are in conflict with that decision and are otherwise in error.

GROUND I AND II.

In the *Seeley Tube & Box Co.* case a taxpayer made certain errors in its 1941 tax return which when corrected resulted in an additional tax which was assessed as a deficiency and collected together with interest thereon. In its 1943 tax return the taxpayer disclosed a net loss which when carried back as a deduction for 1941 resulted in a tax refund for that year. The Government refunded the tax but refused to refund the interest which was collected when the deficiency was collected.

The taxpayer sued for the interest. The District Court found for the Government but the Circuit Court reversed on the ground that the result of the

loss carry back was to wipe out the debt for the tax deficiency, and since there was no debt there could be no interest because interest was assessable only on a debt. The Supreme Court reversed. The income tax statute specifically provided that no interest should be allowed on a refund resulting from a loss carry-back and the Congressional reports on the statute clearly provided that the statute did not permit a deferment of the tax but required *the taxpayer to first pay his tax* without regard to such loss deduction and then file claim for refund of any overpayment due to the loss carry-back, and because of these provisions the Supreme Court held that the taxpayer must pay the correct tax when due upon filing of the return, and if there is an understatement of that tax the taxpayer must pay interest on that understatement, even though there might be a refund later due to a loss carry-back with respect to which refund however the statute specifically provides that it shall be refunded without interest.

In reaching its conclusion, the Supreme Court first described the general statutory scheme for reporting and collecting of the tax. It pointed out that the tax which is due upon the filing of the return, is the correct tax due for that year, and if there is an understatement of tax on the return such understatement is assessable as a deficiency and "interest upon this deficiency at the rate of 6 per cent from the date the tax was lawfully due to the date of the assessment is assessed at the same time as the deficiency." The Supreme Court emphasized that "from the date the orig-

inal return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States; a duty to pay its tax. * * *” and “For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. * * *” and “A taxpayer who files a timely return but does not pay the tax *on time* must pay the interest on the tax until payment. * * *” (Italics ours) and “When the Commissioner assesses a deficiency he also may assess interest on that deficiency from the date the tax was due to the assessment date.” Since under this analysis, interest was chargeable from the time the tax was due and payable, the Supreme Court then proceeded to point out that the tax deficiency assessed against the Seeley Tube & Box Co. was due and payable when the return for 1941 was filed and that the statute did not defer or delay the prompt payment of taxes properly due.

The Supreme Court pointed out that when Congress allowed the carry-back deductions, “there is no indication that Congress intended to encourage taxpayers to cease prompt payment of taxes,” and, quoting from a Senate Report, the taxpayer “must therefore file his return and pay his tax without regard to such deduction, and must file his claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back,” from which report the Court concluded, “we can imagine no clearer indication of a Congressional understanding and intent *that the carry-back was not to be inter-*

puted as deferring or delaying the prompt payment of taxes properly due" (italics ours), and that the carry-back provision did not "retroactively alter the duty of a taxpayer to pay his full tax promptly," which conclusion, the Supreme Court said, was amply supported by Section 3771(e) of the Code which specifically provides that no interest is to be paid on refunds resulting from the application of the carry-back.

It is appellee's conclusion from the reading of this case that interest on a deficiency starts from the date the tax is due and payable, and that the due and payable date is the filing date for the return *unless the statute allows a deferment or delay for payment*, in which event the due and payable date would be the date when a "positive obligation to the United States" to pay the tax first arose. In this very case, had the Government tried to collect the deferred tax before first rejecting the appellee's claim for relief, the appellee could have resisted the claim without difficulty *on the ground that the tax was not due and that it had no obligation to the United States to pay this tax until after rejection of its relief claim.* (*California Vegetable Concentrates, Inc.*, 1948, 10 T. C. 1158.) There is certainly no doubt that Section 710(a)(5) gives specific permission to defer payment of part of the tax and there is nothing in the statute anywhere which says or infers that the tax so deferred is to be considered at any time as due or payable at the time the return is filed.

It is respectfully submitted that this Honorable Court erred in concluding that the deferred tax, if later determined to be owing, should be treated as if it had been owing from the time the return was filed, and interest should start to run from that date, first because Section 710(a)(5) specifically provides that such tax is not due or payable on that date, and secondly because the date upon which interest is to start must be a date "prescribed for payment" (Section 292(a)) of the tax which is being assessed as a deficiency, and the return date is not the date prescribed for payment of the deferred tax. The fact that the Supreme Court took care to analyze the statutes and legislative history of the carry-back provisions to establish that no deferment or delay for payment of a tax deficiency which might be affected by a carry-back was allowable under the statute, and the general expressions of the Court throughout the opinion that interest was chargeable on the tax deficiency from the time it was lawfully due, is clear indication that the Court was of the opinion that if the tax deficiency had not been due or payable on the filing date of the return, no interest could have been collectible from that date to the date when the tax first became due and payable.

It is most incongruous to conclude, as this Court did, that in determining interest on a certain tax, which interest must start to run from "the date prescribed for payment of the tax," reference must be made to the date prescribed for payment of another tax, especially when the statute is specific that the

date prescribed for payment of the other tax is not the date prescribed for payment of the particular tax in question. It seems clear from the context of the entire Section 292(a), that the use of the term "tax" in the phrase "date prescribed for the payment of the tax" is intended to distinguish between the tax which is the subject of the deficiency, and the "deficiency" as such because the deficiency which would include tax, interest and penalty if any, and is payable upon notice and demand from the Collector, whereas the tax which is the subject of the deficiency may have been due and payable on some other date. The tax which may be the subject of a deficiency under Section 292(a) could be a tax against a corporation, or against an individual, or against a decedent, or against an estate or a fiduciary, or a personal holding company, or a tax which was deferred under Section 710(a)(5) which is given separate recognition in Section 292(b), all of which taxes may have different due dates, so the "date prescribed for the payment of the tax" as that term is used in Section 292(a) must necessarily refer to the date prescribed for the payment of the tax which is the subject of, or the tax part of, the deficiency.

It is respectfully submitted that for the reasons hereinabove stated, the Court erred in concluding that even though the date of payment of a tax is specifically delayed or deferred by a statutory provision, interest is chargeable upon that tax if it is later assessed from a date it would have been payable had the payment date not been deferred by the statute.

GROUNDS III AND IV.

This Court seemed concerned that unless interest was charged in cases such as this, some taxpayers would enjoy an unfair advantage over others or over the Government. The Court may have overlooked the fact that Congress, by enactment of Section 710(a) (5) has earmarked a certain class of taxpayers for favored treatment by granting to them the right to defer payment of part of their tax. Every taxpayer in that designated class was given the same right to enjoy such favored treatment, but no other taxpayer had the right to defer payment of its tax. When Congress enacted Section 710(a) (5) by Section 222(b) of the Revenue Act of 1942, it was thinking of extending relief to taxpayers. In the early part of its report, paragraph "8" of Part "II", the House Ways and Means Committee discussed the need for "removing certain inequities and alleviating hardships" from the "unfair application of the excess-profits tax in abnormal cases", and in the latter part of its report relating to "Section 213, Relief Provisions" it stated (p. 148, Report No. 2333, 77th Congress, 2d Session, relating to H.R. 7378):

"Deferment of Tax.—Although it is believed advisable to require a taxpayer seeking relief under section 722 to compute and pay its tax without the benefit of such section, there are some cases in which it would be inequitable to compel the taxpayer to pay the entire amount of such tax. Section 710(a) is therefore amended to provide that if the adjusted excess profits net income (computed without the benefit of sec. 722) for any taxable year in which the taxpayer claims

relief under such section is in excess of 50 percent of the normal tax net income for such year (computed without the credit for adjusted excess-profits net income) the amount of the tax payable at the time required for payment may be reduced by an amount equal to 33 percent of the reduction claimed in the tax. Thus, at the time required for payment, an eligible taxpayer need pay only 67 percent of that portion of the tax from which it claims relief. Any reduction in tax determined under section 722 in excess of the amount deferred by the taxpayer will have the effect of producing an overpayment of tax. Any determination of tax greater than the total amount paid will produce a deficiency.”

Prior to the Revenue Act of 1942, Section 722(e) read:

“Application for Relief Under This Section.—The taxpayer shall compute its tax and file its return under this subchapter without the application of this section * * *”

Section 222(a) of the Revenue Act of 1942 amended this subsection by changing it to Section 722(d), reading as follows:

“Application for Relief Under This Section.—The taxpayer shall compute its tax, file its return, *and pay its tax* under this subchapter without the application of this section, *except as provided in Section 710(a)(5)* * * *.” (Amendments in italics.)

and Section 222(b) of the Revenue Act of 1942 added Section 710(a)(5) to the Internal Revenue Code. It

is obvious that the enactment of Section 710(a)(5) was intended as an extension of relief to taxpayers eligible therefor. Since this relief was not conditioned upon ultimate liability for the deferred tax, it seems inconsistent to conclude that Congress, while granting relief on the one hand, intended on the other hand to impose an interest burden in the event the deferred tax became due and payable at a later date. Since Congress allowed this deferment of tax as a measure of relief, it is but a logical consequence that this relief should extend to a deferment of the starting date for interest in the event this deferred tax is later found to be due.

This Court also seemed concerned that a limitation on interest would encourage frivolous claims. (The excess profits tax was repealed in 1945 so the question here involved could relate only to taxes for the years 1942 to 1945.) The Government certainly would have no trouble collecting interest where frivolous claims were filed (*Busser v. U. S.*, C.C.A. 3, 1942, 130 F. (2d) 537) and as to this case the District Court found as a fact that appellee's claim was not frivolous but "was a bona fide claim made in good faith" and "plaintiff believed and under the evidence had the right in all honesty to believe that plaintiff was entitled to the relief it claimed" (R. 86).

This Court stated that in its opinion, Section 292(b) by specifying that September 16, 1945 was not to be the starting date for interest on a deferred tax later found to be due, indicated a legislative intent that the

starting date was to be the filing date of the return. With all due respect to this Court, if it is recognized that Congress intended to favor certain taxpayers by permitting them to defer payment of a tax until some later due date, would it not be more consistent that the purpose of the exclusion in Section 292(b) was to permit the interest to start not from September 16, 1945 but from the date the deferred payment might become due and payable whatever date that might be? There is no legal, logical or practical reason why a taxpayer should owe interest to the Government on a tax for a period prior to the time the tax became due and payable and the taxpayer's obligation to the United States became fixed. The exclusion in Section 292(b) may have been inserted for that very reason—that is to allow interest to start when the obligation for the tax arose rather than to have it start on September 16, 1945, which would be a date without any practical, legal, or logical relation to the time this tax might become due and payable. As observed by this Court, Section 292(b) makes no affirmative provision as to payment of interest on deferred amounts.

It might have appeared to this Court too, that an injustice might be done if no charge were made for interest on this deferred tax. Aside from the fact that Congress deliberately bestowed discriminatory benefits upon a class of taxpayers of which appellee is one, it is practically impossible to prescribe a single rule which would prevent discrimination in every situation regardless of whether interest is or is not held to

be assessable on this deferred tax. For instance, in this very case appellee is prosecuting its Section 722 claim and is preparing to go to trial in an appeal from the Commissioner's action in rejecting the claim. If the appellee should prevail and be entitled to relief in the amount equal to the deferred tax, it will obtain a refund of that tax but as this Court observed, it will get no interest thereon because Section 3771(g) prohibits the payment of interest on refunds resulting from relief under Section 722. It is obvious then that in such event the decision of this Court in this case would be most unjust because it would validate the taking of some \$11,000.00 of interest which appellee would not have had to pay had it not been for the premature action of the Commissioner in assessing the deferred tax, after his rejection of the claim. A taxpayer in a similar situation but against whom the Commissioner had not assessed the deferred tax would pay no interest. It is because of this impossibility of covering every possible situation against some sort of discrimination, that the statutory provisions for the due date for payment of the tax, and for the levy of interest, have to be accepted as a "rule of thumb" to be strictly applied according to their terms, let the results fall where they may. This is evident from the latter part of the Supreme Court's decision in the *Seeley Tube & Box Co.* case in which the Court refused to say whether its decision would have been different if the Commissioner had followed a different administrative procedure and had netted the carry back deduction against other adjustments before de-

termining a deficiency and had assessed merely the net deficiency.

The Supreme Court allowed interest because it was charged on a deficiency *involving a tax which was due* when the return was filed, whereas in this case the deficiency *involves a tax which was not due* when the return was filed. If the appellee correctly understands the *Seeley Tube & Box Co.* decision, the Supreme Court concluded therein that interest is chargeable upon a tax deficiency from the time the tax, which is the subject of the deficiency, becomes due and payable, and that *unless* payment of that tax is deferred or delayed by the statute, it is due and payable when the tax return is filed. In this case the statute, Section 710(a)(5), specifically provides that the payment of the tax which is the subject of the deficiency upon which the interest was assessed, was to be deferred until some date beyond the tax return date and the only other date that could be considered as the date prescribed by the statute as the due and payable date for this deferred tax is the payable date for the deficiency which is the date of the collector's notice and demand for payment. This Court's conclusion to the effect that the deferment under Section 710(a)(5) is to be ignored if the deferred tax is assessed, and that interest is to be charged thereon from the due date of the return as the due and payable date of this deferred tax, is in violation of the well established rule that "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear im-

port of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." (*Gould v. Gould*, 1918, 38 S. Ct. 53, 245 U. S. 151; *U. S. v. Updike*, 1930, 281 U. S. 489, 50 S. Ct. 367.)

It is respectfully submitted that the starting of interest from the date the deferred tax first became a definite obligation of the taxpayer to the United States, is not inconsistent with the general scheme of the taxing statutes for the assessment and collection of taxes, deficiencies, and interest thereon, and that under the *Seeley Tube & Box Co.* case there is recognition of the possibility that the date of payment of a tax may be delayed or deferred by statute and if such date is deferred interest shall not start to run until the date the tax, the payment of which has been deferred, becomes due and payable, and the Court's conclusion to the effect that for the purpose of computing the interest, the deferment allowed by statute should in effect be ignored, is in error.

STATUTES.

For the convenience of the Court, the applicable statutory provisions are reprinted in the Appendix hereto.

CONCLUSION.

It is respectfully urged that the statutory provisions for computing tax assessments and interest charges constitute "rule of thumb" provisions which must be strictly construed according to their terms, and that under these provisions the only date prescribed for payment of the deferred tax is the date of notice and demand from the Collector and since interest is not to start except from the date prescribed for payment of the deferred tax, it cannot start to run earlier than September 30, 1944, the date of the Collector's notice and demand for payment.

Wherefore, appellee respectfully requests that this Court grant this petition for rehearing of this case in the light of the representations herein contained, to the end that in the event this Court's decision was rendered without consideration of the arguments herein submitted which appellee had no opportunity to present heretofore, as herein explained, this Court's opinion may be changed and the District Court's judgment may be affirmed.

Dated, San Francisco, California,
May 15, 1950.

GEORGE H. KOSTER,
*Counsel for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL

I, George H. Koster, counsel for the above named appellee, do hereby certify that the foregoing Petition for Rehearing is not presented for the purpose of delay or vexation, but is, in my opinion, well founded in law and proper to be filed herein.

Dated, San Francisco, California,
May 15, 1950.

GEORGE H. KOSTER,
*Counsel for Appellee
and Petitioner.*

(Appendix Follows.)

Appendix.

Appendix

SEC. 729. LAWS APPLICABLE

(a) **GENERAL RULE.** All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

SEC. 53. TIME AND PLACE FOR FILING RETURNS

(a) TIME FOR FILING—

(1) **GENERAL RULE.** Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

SEC. 56. PAYMENT OF TAX

(a) **TIME OF PAYMENT.** The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) **INSTALLMENT PAYMENTS.** Except in the case of an individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable), the taxpayer may elect to pay the tax in

four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

SEC. 710(a)(5). DEFERMENT OF PAYMENT IN CASE OF ABNORMALITY

If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income) the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

SEC. 271(a) DEFINITION OF DEFICIENCY

IN GENERAL. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means

the amount by which the tax imposed by this chapter exceeds the excess of—

- (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over * * *
- (2) the amount of rebates, as defined in subsection (b)(2), made.

SEC. 271(b) RULES FOR APPLICATION OF SUBSECTION (a)

For the purposes of this section—

- (1) The tax imposed by this chapter and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in section 143(a);
- (2) The term “rebate” means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a)(1) over the amount of rebates previously made; and

- (3) The computation by the collector, pursuant to section 51(f), of the tax imposed by this chapter shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

SEC. 272. PROCEDURE IN GENERAL

(b) **COLLECTION OF DEFICIENCY FOUND BY BOARD.** If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) **FAILURE TO FILE PETITION.** If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

SEC. 292. INTEREST ON DEFICIENCIES

(a) **GENERAL RULE.** Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected

as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) DEFICIENCY RESULTING FROM RELIEF UNDER SECTION 722. If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710(a)(5), and excluding, in case the taxpayer has availed itself of the benefits of section 710(a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of

excess profits tax arising from the operation of section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

SEC. 3771. INTEREST ON OVERPAYMENTS

(g) CLAIMS BASED UPON RELIEF UNDER SECTION 722. If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.



